Supreme Court, U.S.
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No. 07-986

In The Supreme Court of the United States

DAVID HUGHES,

Petitioner,

v.

ROGER D. STOTTLEMYRE, Colonel, in his official capacity; JAMES P. RIPLEY, as an individual and in his official capacity; ERIC WILHOIT, as an individual and in his official capacity; and VINCENT ELLIS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case involves a circuit split over the burden-shifting framework applicable to public employee First Amendment retaliation cases as articulated in *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274 (1977). The Eighth Circuit has repeatedly held, in conflict with all other circuits and this Court's precedents, that after a public employee proves his protected speech was a motivating factor for a state actor's adverse employment actions, the plaintiff must additionally prove that the state actor's proffered reasons for its actions are pretextual. All other circuits hold that once a plaintiff proves the state actor's unconstitutional motivation, the burden shifts to the state actor to prove it would have taken the same action even in the absence of the employee's protected speech. In the present case, the Eighth Circuit imposed the enhanced burden on the employee, relieving the state actors of any burden of proof. The question presented is:

Whether a public employee in a First Amendment retaliation case who proves that his protected speech was a motivating factor in the state actor's adverse actions must further prove that the reasons the state actor articulates for taking such adverse actions are a pretext in order to establish a violation of his constitutional rights.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Constitutional Provision Involved	1
Statement of the Case	2
Reasons for Granting the Petition	5
I. The Court should grant certiorari to review the Eighth Circuit's holding that a public employee bears the burden of proving that the state actor's proffered reason for its conduct is pretextual	5
A. The Eighth Circuit's position on the burden of proof in First Amendment cases conflicts with the holdings of all other circuits and is "deliberate" and "well-entrenched"	5
B. The Eighth Circuit's application of *McDonnell Douglas* to public employee First Amendment retaliation cases is inconsistent with this Court's precedents	9

TABLE OF CONTENTS – Continued

Page

C. Whether a public employee bears the burden of proving his employer's proffered reasons for an adverse action are pretextual or whether the public employer bears the burden of proving it would have taken the same action in the absence of the employee's protected conduct is an important and recurring issue 11

II. The Eighth Circuit's decision erroneously imposes an enhanced burden of proof on employees who have already proved that the state actor's conduct was motivated by unconstitutional factors 14

Conclusion 16

Appendix

Opinion, *Hughes v. Stottlemyre*, No. 06-4203 (8th Cir. Oct. 26, 2007) ..... App. 1

Opinion, *Hughes v. Stottlemyre*, No. 04-4053-CV-C-NKL (W.D. Mo. Dec. 4, 2006) ..... App. 9

Opinion, *Hughes v. Stottlemyre*, 454 F.3d 791 (8th Cir. 2006) ..... App. 14

Opinion, *Hughes v. Stottlemyre*, No. 04-4053-CV-C-NKL (W.D. Mo. May 27, 2005) ..... App. 37

TABLE OF AUTHORITIES

Page

CASES

Allen v. Iranon, 283 F.3d 1070 (9th Cir. 2002) 6

Benjamin v. Washington State Bar Ass'n, 980 P.2d 742 (Wash. 1999) 7, 13

Board of County Comm'rs, Wabaunsee County, Kan. v. Umbehr, 518 U.S. 668 (1996) 10, 11

Brammer-Hoelter v. Twin Peaks Charter Academy, 492 F.3d 1192 (10th Cir. 2007) 6

Brunick v. Clatsop County, 129 P.3d 738 (Or. Ct. App. 2006) 7, 12

Bryson v. City of Waycross, 888 F.2d 1562 (11th Cir. 1989) 6

Burton v. City of Belle Glade, 178 F.3d 1175 (11th Cir. 1999) 12

Carey v. Piphus, 435 U.S. 247 (1978) 11

Center for Bio-Ethical Reform, Inc. v. City of Springboro, 477 F.3d 807 (6th Cir. 2007) 12

Clark v. Library of Congress, 750 F.2d 89 (D.C. Cir. 1984) 6

Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036 (6th Cir. 2001), *cert. denied*, 537 U.S. 813 (2002) 6

Columbus Bd. of Ed. v. Penick, 443 U.S. 449 (1979) 12

County of Charleston v. Sleepy Hollow Youth, Inc., 530 S.E.2d 636 (S.C. Ct. App. 2000) 13

TABLE OF AUTHORITIES – Continued

Page

Crawford-El v. Britton, 523 U.S. 574 (1998) 10

Davison v. City of Minneapolis, Minn., 490 F.3d 648 (8th Cir. 2007) 8

Duffy v. McPhillips, 276 F.3d 988 (8th Cir. 2002) 7, 8

Fraternal Order of Police v. County of Douglas, Neb., 699 N.W.2d 820 (Neb. 2005) 7, 13

Freeman v. Blair, 862 F.2d 1330 (8th Cir. 1988) 12

Furnco Const. Corp. v. Waters, 438 U.S. 567 (1978) 14

Galli v. New Jersey Meadowlands Comm'n, 490 F.3d 265 (3d Cir. 2007) 5, 12

Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410 (1979) 9

Gonzales v. Dallas County, Tex., 249 F.3d 406 (5th Cir. 2001) 5

Gorman-Bakos v. Cornell Co-op Ext. of Schenectady County, 252 F.3d 545 (2d Cir. 2001) 12

Graning v. Sherburne County, 172 F.3d 611 (8th Cir. 1999) 6, 7

Hartman v. Moore, 547 U.S. 250 (2006) 10

Hosford v. School Comm. of Sandwich, 659 N.E.2d 1178 (Mass. 1996) 7, 13

Hudson v. Norris, 227 F.3d 1047 (8th Cir. 2000) 7

Hunter v. Underwood, 471 U.S. 222 (1985) 10

TABLE OF AUTHORITIES – Continued

Page

Igram v. Johnson, 187 F.3d 877 (8th Cir. 1999) 6

Johnson v. Jefferson County Bd. of Health, 662 P.2d 463 (Colo. 1983).....7, 13

Jones v. Plaster, 57 F.3d 417 (4th Cir. 1995) 5

Kesser v. Cambra, 465 F.3d 351 (9th Cir. 2006) 12

Larson v. Cooper, 113 P.3d 1196 (Alaska 2005) 7, 12

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).....*passim*

Monts v. Board of Sup'rs of La. State Univ., 812 So.2d 787 (La. Ct. App. 2002).....12

Morris v. City of Chillicothe, No. 06-3993 (8th Cir. Jan. 14, 2008).....7, 8

Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274 (1977).....*passim*

O'Hare Truck Servs., Inc. v. City of Northlake, 518 U.S. 712 (1996).....10

O'Rourke v. Commonwealth, 778 A.2d 1194 (Pa. 2001).....7, 13

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000).....15

Rauser v. Horn, 241 F.3d 330 (3d Cir. 2001).....12

Sagendorf-Teal v. County of Renssalaer, 100 F.3d 270 (2d Cir. 1996).....5

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).....14, 15

TABLE OF AUTHORITIES – Continued

Page

Schlicher v. Board of Fire and Police Comm'rs, 845 N.E.2d 55 (Ill. Ct. App. 2006) 12

Sowards v. Loudon County, Tenn., 203 F.3d 426 (6th Cir.), *cert. denied*, 531 U.S. 875 (2000) 6

Spiegla v. Hull, 371 F.3d 928 (7th Cir. 2004) 6

Stella v. Kelley, 63 F.3d 71 (1st Cir. 1995) 5

Terminix Int'l, Inc. v. Secretary of Labor, 92 S.W.3d 743 (Ky. Ct. App. 2002) 12

Texas v. Lesage, 528 U.S. 18 (1999) 10, 11

Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) 10

CONSTITUTIONAL PROVISION

U.S. Const. Amend I ..... *passim*

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 4

28 U.S.C. § 1331 2

David Hughes respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The district court's first decision is unofficially reported at 2005 WL 1279027 and is reproduced at App. 37-75. The Eighth Circuit's first decision, *Hughes I*, is reported at 454 F.3d 791 and is reproduced at App. 14-36. The district court's decision after remand is unofficially reported at 2006 WL 3498325 and is reproduced at App. 9-13. The Eighth Circuit's second decision, *Hughes II*, is reported at 506 F.3d 675 and the slip opinion is reproduced at App. 1-8.

JURISDICTION

The court of appeals entered judgment on October 26, 2007. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the First Amendment to the United States Constitution, "Congress shall make no law . . . abridging the freedom of speech. . . ."

STATEMENT OF THE CASE

Plaintiff is an officer in the Missouri Highway Patrol who in 2003 voiced opposition to a reduction in Patrol coverage of the rural county in which he lived and worked. After plaintiff protested, defendants Ripley, Ellis, and Wilhoit, all senior officers, subjected plaintiff to adverse actions which led to his two-level demotion, expulsion from the troop to which he was assigned, and transfer to a casino boat.

Plaintiff filed suit against Ripley, Ellis, and Wilhoit as well as against the Patrol Superintendent, the highest ranking officer, alleging that defendants' adverse actions were motivated by plaintiff's protected speech in violation of the First Amendment. The district court's jurisdiction was based on 28 U.S.C. § 1331, federal question.

The district court granted defendants' motions for summary judgment. With regard to plaintiff's action against Ripley, Ellis, and Wilhoit, the district court found that plaintiff's speech was protected by the First Amendment and assumed that certain of defendants' adverse actions were motivated by that speech. App. 55, 61-62. The district court stated that after plaintiff established that his protected activity was a motivating factor in defendants' adverse actions, defendants could articulate legitimate non-retaliatory reasons for their conduct and plaintiff was required to prove that defendants' articulated reasons were a pretext, relying on circuit authority applying the burden of proof paradigm found in

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). App. 52-53. The district court found that defendants articulated legitimate nonretaliatory reasons for their conduct (App. 65) and that plaintiff did not meet his burden of proving that those reasons were pretextual. App. 75.

The court of appeals reversed (*Hughes I*), holding that plaintiff established defendants' retaliatory motive. App. 29. Citing *Mt. Healthy*, the court stated, "If the employee makes a successful prima facie showing, the burden shifts to the employer to demonstrate the same action would have been taken even in the absence of the protected conduct." App. 22. The court also noted that the district court erroneously based its decision on an issue defendants did not raise in their summary judgment motion, *i.e.*, whether plaintiff established that defendants' reasons for taking adverse actions were pretextual. App. 30-31.

On remand, defendants Ripley, Ellis, and Wilhoit again moved for summary judgment, this time arguing that under *McDonnell Douglas* plaintiff could not prove that defendants' articulated reasons for taking adverse actions against him were a pretext for retaliation. The district court accepted that the law of the case from *Hughes I* was that plaintiff established a prima facie case of retaliation. The court went on to analyze the evidence under *McDonnell Douglas*, reasoning the burden of proof did not shift to defendants under *Mt. Healthy* because plaintiff established his speech was a motivating factor in defendants' adverse actions without "direct" evidence. App. 9-10.

The court granted defendants' motion, finding plaintiff failed to prove that defendants' articulated reasons were pretextual. App. 10. Plaintiff appealed again, with jurisdiction of the appellate court based on 28 U.S.C. § 1291, appeal from a final decision.

In *Hughes II*, the court of appeals affirmed summary judgment and the district court's application of *McDonnell Douglas*, holding that after a plaintiff establishes that his protected speech was a motivating factor in defendant's adverse actions, only a burden of production shifts to the employer to advance a legitimate reason for its conduct but that the "ultimate burden of persuasion remains with the employee to show the adverse employment action was motivated by intentional retaliation." App. 5-6. The court of appeals rejected plaintiff's argument that the burden of proof shifted to defendants under *Mt. Healthy*, holding that *McDonnell Douglas*, not *Mt. Healthy*, applied in the absence of "direct" evidence of a retaliatory motive. App. 8, n.4.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT CERTIORARI TO REVIEW THE EIGHTH CIRCUIT'S HOLDING THAT A PUBLIC EMPLOYEE BEARS THE BURDEN OF PROVING THAT THE STATE ACTOR'S PROFFERED REASON FOR ITS CONDUCT IS PRETEXTUAL

A. The Eighth Circuit's position on the burden of proof in First Amendment cases conflicts with the holdings of all other circuits and is "deliberate" and "well-entrenched."

Every circuit, except the Eighth, holds that in public employee First Amendment retaliation cases a plaintiff establishes a claim with proof that his protected speech was a motivating factor in the state actor's adverse actions unless the state actor proves it would have taken the same adverse action regardless of the plaintiff's speech. Those decisions are not dependent on whether the plaintiff uses "direct" or "indirect" evidence to establish that his speech was a motivating factor. *See, e.g., Stella v. Kelley,* 63 F.3d 71, 74 (1st Cir. 1995) ("The legal framework that applies to claims of this genre is settled beyond hope of contradiction"); *Sagendorf-Teal v. County of Rensselaer,* 100 F.3d 270, 273-74 (2d Cir. 1996) (described evidence was indirect); *Galli v. New Jersey Meadowlands Comm'n*, 490 F.3d 265, 271 (3d Cir. 2007); *Jones v. Plaster*, 57 F.3d 417, 422 (4th Cir. 1995); *Gonzales v. Dallas County, Tex.*, 249 F.3d 406, 412 n.6 (5th Cir. 2001) (rejecting application of *McDonnell*

Douglas to public employee First Amendment case); *Sowards v. Loudon County, Tenn.*, 203 F.3d 426, 431 n.1 (6th Cir.), *cert. denied,* 531 U.S. 875 (2000) (noting that earlier decision from circuit was inconsistent with *Mt. Healthy* and not binding); *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1056-57 (6th Cir. 2001), *cert. denied,* 537 U.S. 813 (2002) (described evidence was indirect); *Spiegla v. Hull*, 371 F.3d 928, 943 (7th Cir. 2004) (same); *Allen v. Iranon,* 283 F.3d 1070, 1074 n.4 (9th Cir. 2002) (rejecting argument that *Mt. Healthy* applies only where there is direct evidence that protected activity was motivating factor); *Brammer-Hoelter v. Twin Peaks Charter Academy,* 492 F.3d 1192, 1208 (10th Cir. 2007); *Bryson v. City of Waycross,* 888 F.2d 1562, 1565-66 (11th Cir. 1989); *Clark v. Library of Congress,* 750 F.2d 89, 101 (D.C. Cir. 1984).

In *Allen,* the court specifically addressed the circuit split, but unlike the Eighth Circuit, rejected the defendants' attempt to infuse the *McDonnell Douglas* pretext requirement into a First Amendment case. As the court observed, "only the Eighth Circuit has deliberately decided that the *Mt. Healthy* burden-shifting analysis should not apply in First Amendment retaliation cases that are based solely on circumstantial evidence." *Allen,* 283 F.3d at 1074 n.4 (citing *Graning v. Sherburne County,* 172 F.3d 611, 615 (8th Cir. 1999) and *Igram v. Johnson,* 187 F.3d 877, 880 (8th Cir. 1999)).

Not only has the Eighth Circuit deliberately staked out a one-circuit minority on the issue, it has

done so repeatedly for years, beginning with *Graning v. Sherburne County* in 1999 and continuing with *Hudson v. Norris*, 227 F.3d 1047, 1050-51 (8th Cir. 2000); *Duffy v. McPhillips,* 276 F.3d 988, 991 (8th Cir. 2002); *Hughes II*; and, recently, *Morris v. City of Chillicothe*, No. 06-3995 (8th Cir. Jan. 14, 2008).

The Eighth Circuit's departure from *Mt. Healthy* in First Amendment cases results in a split with and among the state courts as well. Numerous state courts follow *Mt. Healthy* to analyze the evidence in constitutional or other types of public employee retaliation cases. *E.g., Brunick v. Clatsop County,* 129 P.3d 738, 746 (2006); *Larson v. Cooper,* 113 P.3d 1196 (Alaska 2005) (prisoner free speech and religion retaliation claim); *O'Rourke v. Commonwealth*, 778 A.2d 1194, 1204 (Pa. 2001) (applying *Mt. Healthy* to state whistleblower law); *Benjamin v. Washington State Bar Ass'n,* 980 P.2d 742, 758 (Wash. 1999) (free speech); *Hosford v. School Comm. of Sandwich,* 659 N.E.2d 1178, 1181 (Mass. 1996); *Johnson v. Jefferson County Bd. of Health*, 662 P.2d 463 (Colo. 1983). Relying on the Eighth Circuit's decision in *Hudson v. Norris*, however, the Nebraska Supreme Court applied the *McDonnell Douglas* pretext analysis to a plaintiff's freedom of association claim while, in the same case, relying on *Mt. Healthy* to analyze the plaintiff's freedom of speech claim. *Fraternal Order of Police v. County of Douglas, Neb.,* 699 N.W.2d 820, 827-29 (Neb. 2005).

Shortly before *Hughes II,* a divided panel suggested the Eighth Circuit might resolve the circuit

split by bringing itself into alignment with the other circuits. In *Davison v. City of Minneapolis, Minn.*, 490 F.3d 648 (8th Cir. 2007), a two-judge majority held that the plaintiff's evidence of retaliatory motive was sufficient to shift the burden of proof to defendants, analogizing plaintiff's evidence to that adduced in *Hughes I*. *Id.* at 656. The *Davison* dissent, however, sharply criticized the majority's reliance on *Mt. Healthy* and declared "well-entrenched circuit precedent" called for the application of the *McDonnell Douglas* framework, citing numerous cases from the Eighth Circuit and district courts within the circuit. *Id.* at 662-63.

Just four months later, *Davison* proved the aberration the dissent portrayed it to be when the *Hughes II* panel reiterated the Eighth Circuit's long-standing position that the evidence in *Hughes I* was insufficient to shift the burden of proof to the defendants and that *McDonnell Douglas* was the appropriate framework for analyzing the evidence even after plaintiff proved unconstitutional motivation. Thus, after *Hughes II*, just as has been the situation for years, a plaintiff in the Eighth Circuit who proves retaliatory motive with circumstantial evidence is saddled with the heightened burden of proving that defendant's articulated reason for taking an adverse action was a pretext under *McDonnell Douglas*, with defendant having to prove nothing at all. App. 8, n.4. *See also, Morris v. City of Chillicothe*, slip op. at 7-8 (relying on *Duffy v. McPhillips*, 276 F.3d at 991, with no mention of *Mt. Healthy*).

Unless this Court grants certiorari, the Eighth Circuit will remain the sole circuit in which employers are free to retaliate against employees based on protected expression unless the employee proves both unconstitutional motive and pretext. This Court should grant certiorari to resolve the circuit split.

B. The Eighth Circuit's application of *McDonnell Douglas* to public employee First Amendment retaliation cases is inconsistent with this Court's precedents.

The Eighth Circuit's decision that the *McDonnell Douglas* proof paradigm applies to First Amendment retaliation cases directly conflicts with this Court's precedents, beginning with *Mt. Healthy*, the seminal public employee First Amendment retaliation case relating to burden of proof. In *Mt. Healthy*, this Court held that after a plaintiff establishes that his constitutionally protected conduct was a substantial or motivating factor in the governmental actor's decision, the defendant is liable for a constitutional violation unless it shows by a preponderance of the evidence that it would have reached the same decision even in the absence of plaintiff's protected conduct. *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 287 (1977). *See, e.g., Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 416 (1979) (remanding in light of *Mt. Healthy*, to give defendant opportunity to establish defense to impermissibly motivated conduct). This Court observed that the

allocation of the burden of proof pronounced in *Mt. Healthy* was similar to that formulated in other areas of constitutional law, specifically citing *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 270-71 n.21 (1977), an equal protection case decided the same day. *Mt. Healthy,* 429 U.S. at 287. In neither *Mt. Healthy* nor *Village of Arlington Heights* did this Court mention the *McDonnell Douglas* formulation, nor did it suggest that *Mt. Healthy* and *McDonnell Douglas* were to be read together to form a single burden of proof formulation, as the court of appeals held in *Hughes II*.

This Court continues to apply the *Mt. Healthy* burden of proof formula in other kinds of constitutional cases. For example, in *Texas v. Lesage,* 528 U.S. 18 (1999), the plaintiff challenged a race-conscious standard for admission to a graduate program at the University of Texas based on the equal protection clause. This Court held that *Mt. Healthy* provided the mechanism for proving a constitutional injury. *Id.* at 20-21. *See also, Hartman v. Moore,* 547 U.S. 250, 256 (2006) (retaliatory prosecution claim against federal government); *Crawford-El v. Britton,* 523 U.S. 574, 593 (1998) (prisoner civil rights case); *O'Hare Truck Servs., Inc. v. City of Northlake,* 518 U.S. 712, 725 (1996) (refusal to contract for political reasons); *Board of County Comm'rs, Wabaunsee County, Kans. v. Umbehr,* 518 U.S. 668, 676 (1996) (same); *Hunter v. Underwood,* 471 U.S. 222 (1985) (constitutionality of state law disenfranchising persons convicted of

certain crimes); *Carey v. Piphus,* 435 U.S. 247, 260 (1978) (procedural due process claim).

The Eighth Circuit's decision in *Hughes II* conflicts with a number of this Court's decisions involving deprivation of constitutional rights. Thus, David Hughes has been denied a right enjoyed by public employees in the rest of the country because he happens to live within the Eighth Circuit. The Court should grant certiorari to ensure that public employees in the Eighth Circuit – like those in every other circuit – enjoy the full protection of their constitutionally guaranteed right of free speech.

C. Whether a public employee bears the burden of proving his employer's proffered reasons for an adverse action are pretextual or whether the public employer bears the burden of proving it would have taken the same action in the absence of the employee's protected conduct is an important and recurring issue.

The burden of proof issue presented in this case is recurrent and arises in the context of cases going to the heart of individuals' liberties and their right to equal protection of the laws.

This burden of proof issue arises in more than just public employment free speech cases. *See, e.g., Texas v. Lesage,* 528 U.S. at 20-21 (applying *Mt. Healthy* in equal protection case); *Board of County*

Comm'rs, Wabaunsee County, Kans. v. Umbehr, 518 U.S. at 676 (refusal to contract based on free speech); *Center for Bio-Ethical Reform, Inc. v. City of Springboro,* 477 F.3d 807, 823-24 (6th Cir. 2007) (free expression claim unrelated to employment); *Kesser v. Cambra,* 465 F.3d 351, 372 (9th Cir. 2006) (concurrence) (race-based jury selection); *Columbus Bd. of Ed. v. Penick,* 443 U.S. 449, 465 n.13 (1979) (school segregation case); *Galli v. New Jersey Meadowlands Comm'n,* 490 F.3d at 271 (political affiliation); *Gorman-Bakos v. Cornell Co-op Ext. of Schenectady County,* 252 F.3d 545 (2d Cir. 2001) (termination as volunteer based on protected speech); *Rauser v. Horn,* 241 F.3d 330, 334 (3d Cir. 2001) (free exercise of religion); *Burton v. City of Belle Glade,* 178 F.3d 1175, 1189 (11th Cir. 1999) (race-based vote dilution); *Freeman v. Blair,* 862 F.2d 1330, 1332 (8th Cir. 1988) (retaliation for refusal to consent to warrantless search).

As discussed above in Part I.A., the burden of proof issue is not limited to federal litigation; it arises in state courts as well, with the state courts looking to federal caselaw for guidance. *See, e.g., Schlicher v. Board of Fire and Police Comm'rs,* 845 N.E.2d 55, 65 (Ill. Ct. App. 2006); *Brunick v. Clatsop County,* 129 P.3d at 746; *Larson v. Cooper,* 113 P.3d at 1198 (prisoner free speech and religion retaliation claim); *Terminix International, Inc. v. Sec'y of Labor,* 92 S.W.3d 743, 747-48 (Ky. Ct. App. 2002) (retaliation statute); *Monts v. Bd. of Sup'rs of La. State Univ.,* 812

So.2d 787, 790 (La. Ct. App. 2002) (free speech claim); *O'Rourke v. Commonwealth*, 778 A.2d at 1204 (applying *Mt. Healthy* to state whistleblower law); *County of Charleston v. Sleepy Hollow Youth, Inc.*, 530 S.E.2d 636 (S.C. Ct. App. 2000) (federal Fair Housing Act case); *Benjamin v. Washington State Bar Ass'n*, 980 P.2d at 758 (free speech); *Hosford v. School Comm. of Sandwich*, 659 N.E.2d at 1181; *Johnson v. Jefferson County Bd. of Health*, 662 P.2d at 472-76 (free speech claim). The Eighth Circuit's analysis, however, crept into one state's analysis as noted above. *See, Fraternal Order of Police v. County of Douglas, Neb.*, 699 N.W.2d at 829.

For more than thirty years, state and federal courts alike have relied on *Mt. Healthy* to safeguard individuals' constitutional rights while at the same time assuring that the individuals are in no better a position than they would have been had they not engaged in protected activity. *Mt. Healthy*, 429 U.S. 285-86. Only public employees in the Eighth Circuit are deprived of that safeguard. This unsatisfactory state of affairs has persisted in the Eighth Circuit for years and there is no reason to believe that the Eighth Circuit will ever right itself and bring itself into conformity with this Court's precedents and the law of every other circuit. This Court should grant certiorari and end this conflict.

II. THE EIGHTH CIRCUIT'S DECISION ERRONEOUSLY IMPOSES AN ENHANCED BURDEN OF PROOF ON EMPLOYEES WHO HAVE ALREADY PROVED THAT THE STATE ACTOR'S CONDUCT WAS MOTIVATED BY UNCONSTITUTIONAL FACTORS

Given *Hughes I*'s recognition that plaintiff proved that his protected speech was a motivating factor in defendants' adverse actions (App. 21-22, 30; 9-10), the burden should have shifted to defendants to prove by a preponderance of the evidence that they would have taken the same actions in the absence of plaintiff's protected speech. Instead, the Eighth Circuit imposed an enhanced burden on plaintiff, requiring him to prove not only defendants' unconstitutional motive, but additionally that defendants' proffered reasons for their actions were pretextual. App. 5-6. In combining two burden of proof formulations, the Eighth Circuit erroneously equated a plaintiff's burden under *Mt. Healthy* to the *McDonnell Douglas* prima facie case, something neither this Court nor any other circuit does.

The *McDonnell Douglas* prima face case requires a minimal showing, *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993), and is not the equivalent of a factual finding of discriminatory motive. *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 579 (1978). Instead, the *McDonnell Douglas* prima facie case merely eliminates some obvious reasons an employer might have for taking the adverse action at issue. *Id.* at 577. If an employer comes forward with a

non-discriminatory explanation for its conduct, the employee must prove that the explanation is pretextual in order to establish the inference of discriminatory motive. *St. Mary's Honor Center*, 509 U.S. at 508.

By contrast, a public employee's burden in a First Amendment case requires proof that at least one of the employer's motives for its conduct was an impermissible one – the employee's protected speech. The *McDonnell Douglas* requirement that the plaintiff prove pretext does not exist in a First Amendment case because the First Amendment plaintiff has already demonstrated the defendant's unconstitutional motive, in contrast to the employment discrimination plaintiff who, in the face of an employer's legitimate explanation, must still prove discriminatory intent. It is only at the end of the entire *McDonnell Douglas* exercise that a plaintiff reaches the same point – the inference of unlawful motive – which plaintiff Hughes had already proven in *Hughes I. Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000) (applying *McDonnell Douglas* to age discrimination case). Since the *McDonnell Douglas* prima facie case does not perform the same function as the plaintiff's burden under *Mt. Healthy*, there is no legal or logical basis for requiring a plaintiff who meets his *Mt. Healthy* burden to prove pretext.

The Eighth Circuit's decision imposes an enhanced burden of proof for plaintiffs in constitutional cases, as required by no other circuit. This Court should grant certiorari to correct the Eighth Circuit's

repeated and well-entrenched misstatement of the law on this recurrent and important issue.

CONCLUSION

Because the court of appeals applies *McDonnell Douglas* to First Amendment cases, contrary to *Mt. Healthy* and all other circuits, petitioner asks that this Court grant certiorari.

Respectfully submitted,

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United States Court of Appeals, Eighth Circuit.
David HUGHES, Plaintiff-Appellant,
v.
Roger D. STOTTLEMYRE, Colonel, in his official capacity; James P. Ripley, as an individual and in his official capacity; Eric Wilhoit, as an individual and in official capacity; Vincent Ellis, Defendants-Appellees.
No. 06-4203.

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Appeal from the United States District Court for the Western District of Missouri.

David Eric Sowers, Ferne Paula Wolf, Sowers & Wolf, St. Louis, MO, for Plaintiff-Appellant.

Theodore A. Bruce, Assistant Attorney General, Attorney General's Office, Jefferson City, MO, for Defendants-Appellees.

Before BYE, RILEY, and BENTON, Circuit Judges.

BYE, Circuit Judge.

David Hughes was a sergeant with the Missouri State Highway Patrol (MSHP) until he was demoted and transferred. Hughes brought a 42 U.S.C. § 1983 action against Roger D. Stottlemyre in his official capacity as MSHP Superintendent,[1] his immediate supervisors, Captain Vincent Ellis and Lieutenant James Ripley, individually, and Eric Wilhoit, an

investigator in the MSHP's Professional Standards Division, individually. Hughes claimed Ellis, Ripley and Wilhoit violated his First Amendment free speech rights by retaliating against him for opposing proposed changes in MSHP policy. The district court[2] granted defendants' motion for summary judgment finding Hughes failed to discredit the legitimate non-retaliatory reasons offered for his demotion and transfer. Hughes appeals and we affirm.

I

The facts relevant to this appeal, viewed in the light most favorable to Hughes, *Dush v. Appleton Elec. Co.*, 124 F.3d 957, 962-63 (8th Cir. 1997) (summary judgment standard), are as follows.[3] In 2003, Hughes was a Zone Sergeant assigned to Bates County, Missouri. His direct supervisor was Lieutenant Ripley who served in a supervisory role in Bates County and Cass County, Missouri. Bates County and Cass County are located within the boundaries of the MSHP's Troop A, which was commanded by Captain Ellis. In June 2003, the MSHP was considering consolidating Bates and Cass counties. Hughes attended a meeting with Ellis and Ripley to discuss the proposed consolidation and expressed disagreement. As an alternative, Hughes suggested one trooper from Bates County be reassigned to Cass County to relieve its personnel problems. Ellis and Ripley favored consolidation and Ripley voiced dissatisfaction with Hughes's alternative plan, but Ellis delayed consolidation and temporarily adopted

Hughes's suggestion. Following the meeting, Ripley was visibly angry and, at this point, according to Hughes, Ellis and Ripley began a campaign of retaliation.

Hughes contends four disciplinary complaints initiated against him were brought in retaliation for his criticism of the consolidation plan. The first involved a trooper under Hughes's supervision who darted across a Missouri highway to kill a coyote and trespassed on private land to retrieve it. The complaint, initiated by Corporal Kevin Fisher, alleged Hughes told him to report the incident to Ripley but not volunteer any details. Additionally, the complaint alleged Hughes advised the trooper not to talk with investigators without a lawyer present.

The second complaint alleged Hughes ordered an on-duty trooper to transport Hughes's children to and from school on various occasions. The complaint further alleged Hughes also used his patrol vehicle to transport his children to and from school.

The third complaint alleged Hughes, at the behest of state senator Harold Caskey, ordered one of his troopers to retrieve license plates from a private vehicle held at an impound lot. The owner of the lot had not been paid for towing or storage charges and complained to Hughes. When interviewed by the investigator, the owner stated Hughes was rude and told him not to "mess with Senator Caskey."

The fourth complaint involved an incident where Hughes entered Fisher's residence to retrieve the

keys to Fisher's patrol vehicle. Hughes's patrol vehicle had been damaged en route to a traffic accident and he needed a substitute. Fisher was off duty and his patrol vehicle was parked at his home a few miles away. Hughes drove to Fisher's home, entered the locked home using the keypad access code, and located the vehicle keys. Fisher admitted giving Hughes the access code on a previous occasion but had not otherwise given Hughes permission to enter his home.

The four complaints were initiated by Fisher but signed by Ripley or Ellis because MSHP rules do not permit a subordinate to sign a complaint involving a superior. Wilhoit investigated the complaints and interviewed Hughes who admitted the essential factual allegations underlying each complaint. Nevertheless, Hughes contends Ripley and Ellis used the complaints as an opportunity to retaliate against him and enlisted the aid of Wilhoit to further their plan.

In his first appeal, Hughes argued the district court granted summary judgment on a basis not advanced by defendants. We agreed and reversed. On remand, defendants renewed their motion for summary judgment, expressly arguing the complaints were initiated and investigated for legitimate non-retaliatory reasons. The district court again granted summary judgment and this appeal followed. On appeal, Hughes argues the district court erred in 1) applying *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) instead of *Mt. Healthy Sch. Dist. v. Doyle*, 429 U.S. 274, 97 S.Ct.

568, 50 L.Ed.2d 471 (1977), and 2) finding the legitimate non-retaliatory reasons offered by defendants were not pretextual.

II

We review the district court's grant of summary judgment de novo. *Henerey v. City of St. Charles*, 200 F.3d 1128, 1131 (8th Cir. 1999). Summary judgment is proper if the evidence, viewed in the light most favorable to the nonmoving party, demonstrates no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id.*; Fed.R.Civ.P. 56(c).

To establish a prima facie case of retaliation based on the First Amendment, a plaintiff must allege and prove he engaged in conduct protected by the First Amendment and the protected conduct was a substantial or motivating factor in the employer's decision to take the adverse employment action. *Mt. Healthy*, 429 U.S. at 287; *Okruhlik v. Univ. of Ark.*, 395 F.3d 872, 878 (8th Cir. 2005) (noting the same test applies to both First Amendment and Tile [sic] VII retaliation cases).[4] Under the burden-shifting framework of *McDonnell Douglas*, 411 U.S. at 802-03, Hughes has the burden of establishing a prima facie case of retaliation. After a prima facie showing is made, a presumption of retaliation arises, and the burden of production shifts to the employer to advance a legitimate reason for the employment action. *See Ryther v. KARE 11*, 108 F.3d 832, 836 (8th Cir.

1997). Once the employer advances a legitimate reason for the adverse action, the presumption drops out and "the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven that the defendant intentionally discriminated against the plaintiff." *Id.* (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993)). In some situations, this can be shown indirectly by establishing the employer's proffered reason was a pretext for retaliation. *See Hicks*, 509 U.S. at 507-08. The ultimate burden of persuasion remains with the employee to show the adverse employment action was motivated by intentional retaliation. *Id.* at 508.

Ellis, Ripley, and Wilhoit argue the complaints and investigations were not initiated or undertaken in retaliation for Hughes's protected speech. They offer the affidavit and testimony of Fisher stating he alone initiated the complaints and was not coaxed or coached by Ellis or Ripley. Defendants also offer Wilhoit's affidavit stating he was unaware of Hughes's speech until Hughes filed suit, and did not discuss the matter with Ellis or Ripley prior to investigating the complaints. In opposition, Hughes argues Fisher's affidavit and testimony are ambiguous and a reasonable trier of fact could conclude he was not the catalyst for the complaints. Further, he argues, even assuming Fisher was the source of the complaints, Ellis and Ripely [sic] pursued them with retaliatory motives. Finally, he claims Wilhoit conspired with Ellis and Ripley in pursuing the investigations which led to his demotion and transfer.

A review of the evidence demonstrates Fisher came forward with the damaging information without prodding from Ellis or Ripley, and we find nothing in the record to support Hughes's contrary claims. Similarly, we find no support for Hughes's conspiracy theory. Other than Hughes's unfounded speculation, nothing in the evidence supports a link between Wilhoit's investigations, Hughes's opposition to the policy change, and Ellis or Ripley. The uncontroverted evidence demonstrates the complaints were handled in accordance with established MSHP policy and the only involvement Ellis and Ripley had was to sign them and provide information when interviewed by Wilhoit. They neither supervised nor directed the investigations, and there is no evidence whatsoever indicating similarly situated members of the MSHP were treated differently. *See Logan v. Liberty Healthcare Corp.*, 416 F.3d 877, 881 (8th Cir. 2005) (holding a showing of pretext requires more evidence than a prima facie showing because evidence of pretext and retaliation is viewed in light of the employer's proffered non-retaliatory reasons).

III

The judgment of the district court is affirmed.

[1] Stottlemyre is no longer a party to this action.

[2] The Honorable Nanette K. Laughrey, United States District Judge for the Western District of Missouri.

[3] For additional facts *see Hughes v. Stottlemyre*, 454 F.3d 791 (8th Cir. 2006) (*Hughes I*).

[4] We reject Hughes's argument that our citation to *Mt. Healthy* in *Hughes I* suggests the burden-shifting framework of *McDonnell Douglas* is inapplicable to his claims. *See Stewart v. Indep. Sch. Dist. No. 196*, 481 F.3d 1034, 1042-43 (8th Cir. 2007) ("Without direct evidence of a retaliatory motive, we analyze retaliation claims . . . under the burden-shifting framework of [*McDonnell Douglas*].").

2006 WL 3498325

United States District Court,
W.D. Missouri, Central Division.
David HUGHES, Plaintiff,
v.
Roger D. STOTTLEMYRE, James Ripley,
Eric Wilhoit, and Vincent Ellis, Defendants.
No. 04-4053-CV-C-NKL.

Dec. 4, 2006.

D. Eric Sowers, Ferne P. Wolf, Sowers & Wolf, LLC, St. Louis, MO, for Plaintiff.

Theodore A. Bruce, Attorney General's Office, Jefferson City, MO, for Defendants.

ORDER

NANETTE K. LAUGHREY, District Judge.

Pending before the Court is the Defendants' Renewed Motion for Summary Judgment [Doc. # 81]. Also pending is Plaintiff David Hughes's ("Hughes") Motion to Strike [Doc. # 88]. The Court grants the Defendants' Renewed Motion for Summary Judgment and denies Hughes's Motion to Strike as Moot.

I. Defendants' Renewed Motion for Summary Judgment

For purposes of Defendants' Renewed Motion for Summary Judgment, the Court assumes that Hughes engaged in protective speech. In addition, the law of

the case is that Hughes has made a prima facie case of retaliation. Nonetheless, the Court finds that summary judgment should be granted in favor of the Defendants because they have produced evidence of legitimate non-retaliatory reasons for the actions taken against Hughes, including the four disciplinary complaints and investigations which led to Hughes's demotion and transfer. No reasonable juror could find those reasons were pretextual; particularly because Hughes does not contest the facts relied on by Stottlemyre to demote and transfer him, and because it is uncontroverted that Stottlemyre did not know about Hughes's opposition to the Bates County plan.

To reach its ultimate conclusion, the Court has applied the burden shifting test first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973), even though Hughes argues that the Court should use only the burden of proof analysis applied in *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). The *Mt. Healthy* burden of proof standard is applicable when there is direct evidence of retaliation. *See Carroll v. United States Dep't of Labor*, 78 F.3d 352 (8th Cir. 1996). For purposes of summary judgment, the direct/circumstantial evidence distinction is still applicable even after *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). *See Johnson v. AT & T Corp.*, 422 F.3d 756 (8th Cir. 2005). Because there is no direct evidence of retaliation in this case, the *McDonnell Douglas* burden shifting paradigm applies. *See Okruhlik v. Univ. of Arkansas*, 395 F.3d

873, 878 (8th Cir. 2005), and *Duffy v. McPhillips*, 276 F.3d 988 (8th Cir. 2002).

The Court is unpersuaded by Hughes's argument that the Eighth Circuit has mandated that *Mt. Healthy* is the controlling burden of proof standard for all purposes in this case. Because the Eighth Circuit found that this Court should not have gone past the prima facie stage of analysis, it never reached the issue of what burden of proof standard applied after the prima facie case was established. The *Mt. Healthy* and *McDonnell Douglas* burden of proof standards are functionally equivalent for purposes of establishing a prima facie case. Therefore, the Court does not believe that the Eighth Circuit's reference to the *Mt. Healthy* burden of proof standard is evidence that the Eighth Circuit found direct evidence of retaliation. The Eighth Circuit's discussion of Hughes's evidence strongly suggests otherwise and Hughes has not even attempted to show that he has presented direct evidence of retaliation.

One final issue must be addressed. Plaintiff claims that the adverse action in this matter is not Hughes's demotion and transfer, it is the disciplinary reports instigated by the Defendants. For purposes of summary judgment, the Court has considered both. Furthermore, it has assumed that the disciplinary investigations and reports, standing alone, would constitute an adverse action, although there is a good argument to the contrary. *Zelnick v. Fashion Institute of Technology*, 464 F.3d 317 (2nd Cir. 2006).

Nonetheless, the Court concludes that there is insufficient evidence of pretext to warrant a jury trial on that issue. Hughes admits to the facts contained in the disciplinary reports and Stottlemyre, an independent fact finder who was not aware of Hughes's speech, found that these facts showed a violation of patrol policy warranting discipline. Hughes has failed to show that similarly situated people engaged in similar conduct but were not investigated by the Defendants or anyone else in the Highway Patrol. Nor has Hughes shown that he was such a well liked and superior Highway Patrolman that his conduct would have been overlooked by the Defendants, but for his speech about Bates County patrol assignments. Corporal Fisher was the catalyst for the disciplinary complaints against Hughes, and Wilhoite [sic] had no knowledge of Hughes's opposition to the Bates County consolidation plan when he was assigned to complete an investigation of Fisher's charges. The first and second investigations were completed and the third, substantially completed, by the time he even knew about Hughes's statements concerning the consolidation plan. Finally, the record does not support a finding that Wilhoite [sic] lied when he said that he learned, during his first investigation, that Hughes had three other alleged conduct violations. However, even if it did, this is too thin a reed to support a finding that the disciplinary investigations and reports were the result of a conspiracy between Ellis, Riley [sic], Wilhoite [sic] and Fisher to retaliate against Hughes because of his statements concerning the consolidation plan.

I[sic]. Hughes's Motion to Strike

Because the Court has not considered, for purposes of summary judgment, the specific portions of the evidence objected to by Hughes in his Motion to Strike, the Motion is denied as moot.

III. Conclusion

Accordingly, it is hereby

ORDERED that Defendants' Renewed Motion for Summary Judgment [Doc. # 81] is GRANTED;

ORDERED that Plaintiff's Motion to Strike [Doc. # 88] is DENIED as moot.

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454 F.3d 791

United States Court of Appeals, Eighth Circuit.

David HUGHES, Plaintiff-Appellant,

v.

Roger D. STOTTLEMYRE, Colonel, in his official capacity; James P. Ripley, as an individual and in his official capacity; Eric Wilhoit, as an individual and in official capacity; Vincent Ellis, Defendants-Appellees.

No. 05-2774.

Submitted: Jan. 13, 2006.
Filed: July 19, 2006.

Ferne P. Wolf, argued, St. Louis, Missouri (D. Eric Sowers), on the brief.

Theodore Allan Bruce, Assistant Attorney General, Jefferson City, Missouri (Jeremiah W. (Jay) Nixon, on the brief), for appellee.

Before BYE, HEANEY, and COLLOTON, Circuit Judges.

BYE, Circuit Judge.

David Hughes was a sergeant with the Missouri State Highway Patrol (Patrol) until May 2004, when he was demoted by Colonel Roger D. Stottlemyre to trooper and transferred to the Patrol's Gaming Division. Hughes brought a 42 U.S.C. § 1983 action, naming his immediate supervisors, Captain Vincent Ellis and Lieutenant James Ripley, as well as Eric Wilhoit, an investigator in the Patrol's Professional Standards Division. Hughes claims Ellis, Ripley and Wilhoit violated his First Amendment free speech

rights by retaliating against him for opposing proposed changes in Patrol policy. Hughes named Stottlemyre in his official capacity as Patrol Superintendent but does not contend he personally retaliated against him.

The district court dismissed Hughes's claims finding he failed to present any evidence tending to discredit the legitimate non-retaliatory reasons offered for his demotion and transfer. On appeal, Hughes contends the district court applied the wrong test in evaluating his retaliation claim, and granted summary judgment on a basis not asserted by defendants. We affirm in part, reverse in part, and remand.

I

The facts, viewed in the light most favorable to Hughes, *Dush v. Appleton Elec. Co.*, 124 F.3d 957, 962-63 (8th Cir. 1997) (summary judgment standard), are as follows. In 2003, Hughes was a Zone Sergeant assigned to Bates County, Missouri. His direct supervisor was Lieutenant Ripley who served in a supervisory role in Bates County and Cass County, Missouri. Bates County and Cass County are located within the boundaries of the Patrol's Troop A, which was commanded by Captain Ellis. In June 2003, Hughes was told the Patrol was considering consolidating Bates and Cass counties. Hughes attended a meeting with Ellis and Ripley to discuss the proposed consolidation and expressed disagreement. To support his position, Hughes gathered statistics and other information tending to show the change would increase trooper

response time and adversely impact public safety. As an alternative, Hughes suggested one trooper from Bates County be reassigned to Cass County to relieve its personnel problems. Ellis and Ripley favored consolidation, and Ripley voiced dissatisfaction with Hughes's alternative plan. Following the meeting, Ellis chose to delay consolidation and temporarily adopted Hughes's suggestion.[1] Following the meeting, Ripley was visibly angry at Hughes, and it is at this point, according to Hughes, Ellis and Ripley began a campaign of retaliation.

Hughes alleges in the months following the meeting, Ripley repeatedly summoned him to Ripley's office approximately forty-five miles away. Prior to the meeting, Hughes had been called to Ripley's office on only one occasion. Additionally, within a month of the meeting Hughes received two verbal reprimands. One for arriving at work too early and a second for using sick leave while his father was dying of cancer. During this same time, Hughes alleges Ripley told him he disliked him.

Hughes further alleges Ripley and Ellis retaliated by giving him a performance evaluation decidedly more negative than those he had received for the preceding two years. In 2001, his performance was ranked between "Meets Expectations" and "Excels" in all categories, and the comments section contained

[1] In October 2003, the consolidation plan was adopted over Hughes's objections.

primarily positive comments. In 2002, his performance was again ranked between "Meets Expectations" and "Excels," but the comments section carried some negative comments, including: "Sergeant Hughes has become almost consumed with the notion that he is going to be transferred to another division of the patrol." In 2003, after the consolidation plan was adopted, Hughes's performance evaluation indicated he "Meets Expectations" or "Excels," but carried additional negative comments directed at specific instances of conduct. Among other comments, the evaluation stated: "If Sergeant Hughes does not heed the suggestions he has been given the troop staff will have to give serious consideration to his ability to be able to function in a supervisory role." Hughes appealed the 2003 evaluation to Ellis, who rejected the appeal and advised him to improve his job performance.

Next, Hughes contends a policy instituted by Ripley to have subordinates evaluate their sergeants was retaliatory because Ripley discounted negative comments directed at other sergeants, while relying on those directed at him.

Hughes also contends four disciplinary complaints initiated in 2004 were brought in retaliation for his criticism of the consolidation plan. The first involved an incident on December 13, 2003, when a trooper under Hughes's supervision shot across a Missouri highway to kill a coyote and trespassed on private land to retrieve it. The complaint, initiated by Corporal Kevin Fisher who was under Hughes's

supervision, alleged Hughes told him to report the incident to Ripley but not to volunteer any details. Additionally, the complaint alleged Hughes advised the trooper not to talk with investigators without having a lawyer present.

The second complaint, alleged Hughes ordered an on-duty trooper to transport his children to and from school on various occasions between 2001 and 2003. The complaint further alleged Hughes had from time to time used his patrol car to transport his children to and from school. No complaint was leveled at the trooper who transported Hughes's children.

The third complaint, alleged Hughes, at the behest of state senator Harold Caskey, ordered one of his troopers to retrieve license plates from a private vehicle being held at an impound lot. The owner of the lot had not been paid for the towing or storage charges and complained to Hughes. When interviewed by the investigator, the owner stated Hughes was rude and told him not to "mess with Senator Caskey."[2]

Finally, the fourth complaint involved an incident on March 22, 2004, when Hughes entered Fisher's residence to retrieve the keys to Fisher's patrol vehicle. Hughes's patrol vehicle had been damaged in

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[2] Senator Caskey is an attorney and represented Hughes in connection with the first two complaints filed against him. After the third complaint was filed, Hughes was ordered to have no further contact with Caskey.

a collision with a deer en route to a serious traffic accident and he needed a substitute. Fisher was off duty and his patrol vehicle was parked at his home only a few miles away. Hughes drove to Fisher's home, and, when he discovered Fisher was not there, entered the locked home using the keypad access code and located the vehicle keys. Fisher admitted giving Hughes the access code to his home on a previous occasion but indicated he had not otherwise given Hughes permission to enter his home.

Each of these complaints was initiated based on information provided by Fisher but was signed by either Ripley or Ellis because Patrol rules do not permit a subordinate to sign a complaint involving a superior. Each of the instances of alleged misconduct was investigated by Wilhoit in his role as an investigator with the Professional Standards Division of the Patrol. In each instance, Wilhoit interviewed Hughes who admitted much of the factual basis underlying each complaint. Nevertheless, Hughes contends Ripley and Ellis used the complaints as an opportunity to retaliate against him, and enlisted the aid of Wilhoit to further their plan.

As further evidence of retaliation, Hughes alleges in September 2003, Ripley solicited one of Hughes's subordinates for negative information about Hughes, and told Hughes if there was any way to reassign him he would. In March 2004, Hughes alleges Ripley approached another patrol member about accepting a promotion to Bates County and replacing Hughes as Zone Sergeant. In April 2004, Ripley removed Hughes

from the state fair detail; a position Hughes had held for twelve years.

Finally, Hughes alleges he was retaliated against when he was 1) refused a position as a narcotics officer, 2) required to work more Wednesdays and Sundays, and 3) docked 3.5 hours compensatory time for attending a training session out of uniform.

On March 25, 2004, Hughes filed this action against Stottlemyre, Ripley and Wilhoit, alleging these actions constituted adverse employment actions taken in response to his opposition to the consolidation plan. In early May 2004, Stottlemyre convened a staff meeting, which included a Lieutenant Colonel, five majors, Wilhoit, Ellis and Ripley, to determine whether any disciplinary action should be taken in response to the complaints. Wilhoit and Ripley were not asked to make a recommendation as to discipline. Ellis and all but one of the remaining officers in attendance recommended termination. Stottlemyre initially agreed, but reconsidered and chose to demote Hughes and transfer him to the Gaming Division. Ellis complained to Stottlemyre that Hughes should be terminated and insisted he be prohibited from returning to Troop A. On May 11, 2004, Hughes filed an amended complaint adding Ellis as a defendant, and alleging the four complaints which caused his demotion and transfer were punishment for his exercise of protected speech.

The defendants moved for summary judgment arguing Hughes failed to make out a prima facie case

of retaliation. As to the four complaints which Hughes alleges led to his demotion and transfer, the district court assumed Hughes had made a prima facie showing of retaliation against Ellis, Ripley and Wilhoit. The court concluded, however, Hughes failed to show that the legitimate non-retaliatory reason given by Stottlemyre for his demotion and transfer, i.e., the complaints, was pretextual. As to the other alleged adverse employment actions, the district court concluded Hughes failed to make a prima facie showing. On appeal, Hughes argues the district court 1) applied the wrong test for determining whether he had made a prima facie showing of retaliation, and 2) erred in reaching the issue of pretext because the defendants only argued he failed in his prima facie showing.

II

We review the district court's grant of summary judgment de novo. *Spears v. Mo. Dep't of Corr. & Human Res.*, 210 F.3d 850, 853 (8th Cir. 2000). "Summary judgment is proper where the evidence, when viewed in the light most favorable to the nonmoving party, indicates that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." *Id.*

A. Prima Facie Case

To establish a prima facie case of retaliation based on the First Amendment, a plaintiff must

allege and prove he engaged in conduct protected by the First Amendment and the protected conduct was a substantial or motivating factor in the employer's decision to take the adverse employment action. *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977); *Okruhlik v. Univ. of Ark.*, 395 F.3d 872, 878 (8th Cir. 2005) (noting the same test applies to both First Amendment and Title VII retaliation cases). If the employee makes a successful prima facie showing, the burden shifts to the employer to demonstrate the same action would have been taken even in the absence of the protected conduct. *Mt. Healthy*, 429 U.S. at 287, 97 S.Ct. 568. This is the test the district court applied. Accordingly, we reject Hughes's claim the district court applied the wrong standard.

1. Protected Activity

The district court concluded Hughes's opposition to the consolidation plan was protected activity because he expressed concerns over the impact to public safety. On appeal, defendants do not contest the district court's holding. Thus, we assume, without deciding, that Hughes's stated opposition to the consolidation plan was protected under the First Amendment.

2. Adverse Employment Action

To constitute an adverse employment action, the employer's decision must effect a material change in

the terms or conditions of employment. *Bechtel v. City of Belton*, 250 F.3d 1157, 1162 (8th Cir. 2001). Hughes alleges his 2003 performance evaluation constitutes an adverse employment action. The district court rejected the contention because Hughes failed to present any evidence showing it resulted in any material change to the terms or conditions of his employment. We agree. Hughes has presented no evidence tending to show the evaluation was relied upon to effect any material change in the terms or conditions of his employment. *See Spears,* 210 F.3d at 854 (holding a negative performance review is not in itself an adverse employment action, and is actionable only if the employer subsequently uses the review to alter the terms or conditions of employment to the detriment of the employee.) Therefore, we conclude the 2003 performance review does not constitute an adverse employment action.

The district court also concluded Hughes's complaints about working Sundays and Wednesdays, and the policy requiring troopers to review their sergeants, did not constitute adverse employment actions because Hughes failed to allege any impact on the terms or conditions of his employment. Hughes does not respond directly to the district court's findings. Instead, he argues we should view his allegations cumulatively and find in sum they are sufficient to allege an adverse employment action. We disagree.

Although actions short of termination may constitute adverse employment actions within the meaning of the statute, "not everything that makes an

employee unhappy is an actionable adverse action." *Montandon v. Farmland Indus., Inc.*, 116 F.3d 355, 359 (8th Cir. 1997). We have held a reasonable jury could conclude negative references to potential employers constitutes sufficient adverse action to state a retaliation claim. *Smith v. St. Louis Univ.*, 109 F.3d 1261, 1266 (8th Cir. 1997). Conversely, we have also held the loss of status and prestige that accompanied replacement of a supervisor's staff, when her salary and position remained the same, did not constitute a sufficient adverse employment action. *Ledergerber v. Stangler*, 122 F.3d 1142 (8th Cir. 1997). In other words, "[c]hanges in duties or working conditions that cause no materially significant disadvantage . . . are insufficient to establish the adverse conduct required to make a prima facie case." *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994). Here, there is no evidence to suggest Hughes suffered a materially significant disadvantage by having to work more Sundays and Wednesdays or by having his performance reviewed by his subordinates. Therefore, we affirm the district court's holdings on these issues.

The district court concluded the remaining allegations, i.e., the four complaints and resulting investigations; loss of compensatory time; and failure to transfer Hughes to narcotics; were sufficient to allege adverse employment actions. On appeal, defendants do not contend these allegations are insufficient to satisfy the adverse employment action prong of Hughes's prima facie case. Thus, we assume,

without deciding, that Hughes suffered an adverse employment action.

3. Causation

The third and final element of Hughes's prima facie case is causation. To prove a causal connection under the third element, a plaintiff must prove an employer's retaliatory motive played a part in the adverse employment action. *Kipp v. Mo. Highway & Transp. Comm'n*, 280 F.3d 893, 896-97 (8th Cir. 2002). "[E]vidence that gives rise to an inference of a retaliatory motive on the part of the employer is sufficient to prove a causal connection." *Id.* at 897 (internal quotation marks omitted).

The district court concluded Hughes failed to make any showing of causation with respect to the loss of compensatory time because he presented no evidence of a Patrol policy allowing him to attend the training session out of uniform, and admitted he had no proof another trooper was not docked pay for attending out of uniform. As for the Patrol's failure to transfer him to narcotics, the district court noted Hughes failed to identify any of the persons involved in the decision making process and failed to offer any evidence showing the failure to transfer him was in any way related to his exercise of protected speech. On appeal, Hughes fails to address these issues. Because Hughes offers no proof these employment actions were causally related to his speech, we affirm the district court's holdings.

As for the four complaints and investigations, the district court assumed for purposes of summary judgment Hughes had shown causation because they led to his demotion and transfer. Defendants argue the district court erred because there was insufficient evidence as to any of the defendants to show that pursuit of the four complaints and investigations was causally related to his exercise of protected speech.

a. Stottlemyre

Stottlemyre contends there is no evidence he was aware Hughes had spoken out against the consolidation plan, and therefore, there can be no inference of a causal connection between Hughes's speech and Stottlemyre's decision to demote and transfer him. Hughes, citing, among other cases, *Darnell v. Ford*, 903 F.2d 556, 561-62 (8th Cir. 1990), argues Stottlemyre was only sued in his official capacity as a representative of the Patrol and the Patrol can be held liable regardless of Stottlemyre's personal knowledge of Hughes's exercise of protected speech. We disagree.

"[I]t is well settled that § 1983 does not impose respondeat superior liability." *Crawford v. Davis,* 109 F.3d 1281, 1284 (8th Cir. 1997) (citing *Monell v. Dep't of Soc. Servs.* 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)), and nothing in the cases cited by Hughes changes this longstanding rule. For example, in *Ford,* a Missouri Highway Patrol Major (Ford) recommended Captain William Darnell be disciplined for failing to report misconduct by another patrol

member. 903 F.2d at 557. Darnell sued, arguing Ford recommended discipline because Darnell opposed Ford's candidacy for patrol superintendent. *Id.* A jury found in favor of Darnell and awarded substantial damages. *Id.* On appeal, Ford argued the jury erred in finding causation because his recommendation was not directly responsible for Darnell's discipline. *Id.* at 561. Instead, the decision rested with the patrol superintendent. *Id.* at 561-62. This court rejected Ford's argument, stating "causation can be established by direct personal participation in the deprivation or by participation setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict constitutional injuries on third parties." *Id.* at 562 (citing *Johnson v. Duffy,* 588 F.2d 740, 743 (9th Cir. 1978)). *Ford* may be useful to Hughes in arguing his claims against Ellis, Ripley and Wilhoit, but it lends no support to his claim against Stottlemyre. We find the remaining cases cited by Hughes equally inapposite

b. Ellis/Ripley/Wilhoit

Hughes alleges Ellis and Ripley strongly favored the proposed consolidation plan, but when Hughes questioned its impact on public safety they were forced to reconsider the plan. Following the June 2003 meeting, Hughes alleges Ripley was visibly angry, and, when Hughes spoke with him several months later, Ripley continued to voice dismay at Hughes's opposition to the plan. Because of his unwillingness to accede to the plan, Hughes contends

Ellis and Ripley began the campaign of retaliation outlined above, including their pursuit of the four complaints and investigations which led to his demotion and transfer.

Ellis and Ripley contend they played no part in initiating the complaints. Instead, their only role was to – in accordance with Patrol policy – sign the complaints which were initiated by Corporal Fisher. According to Ellis and Ripley, because the complaints were initiated by Fisher and investigated by Wilhoit, Hughes cannot show they set into motion the series of events which led to his demotion and transfer. As evidence, they point to a statement by Wilhoit indicating he discovered the information leading to the second and third complaints during an interview with Fisher conducted in connection with the first complaint.

Hughes disputes Wilhoit's version of those events, and offers a transcript of Wilhoit's interview of Fisher which contains no reference to the incidents involved in the second and third complaints. He also disputes the usefulness of an affidavit prepared by Fisher which indicates Fisher was the source of the second and third complaints because it does not indicate to whom he reported the incidents.

Hughes also alleges the third complaint – involving Senator Caskey who had represented him in the first two complaints – was initiated to prevent Caskey from continuing to serve as legal counsel. As evidence the third complaint was fueled by an improper motive,

Hughes states Caskey told him the Missouri Department of Revenue (MDOR) informed Caskey the license plates were the property of the state and could be seized by the Patrol. According to Hughes, he provided this information to Wilhoit during the investigation, but Wilhoit refused to contact Caskey or MDOR. Additionally, Wilhoit did not include this information in his report or inform Stottlemyre. Finally, Hughes alleges Wilhoit made unsubstantiated accusations of public corruption against Caskey, and, in an attempt to determine if Hughes had contacted Caskey, tried unsuccessfully to obtain Hughes's cellular telephone records without a subpoena or proper authorization.

Viewing all of the alleged actions in the light most favorable to Hughes, we are satisfied there is evidence suggesting a retaliatory motive on the part of Ellis, Ripley and Wilhoit, sufficient to prove a causal connection. Moreover, we reject the defendants' argument under *Ford* that any alleged wrongdoing did not cause or contribute to Hughes's demotion and transfer.

In *Ford*, Ford recommended Darnell be disciplined for his violation of patrol policy. *Id.* at 557. Later, Ford argued his recommendation did not cause Darnell's discipline because the final decision was made by the patrol's superintendent. *Id.* at ~~561~~-62. This court disagreed, finding ample evidence in the record to demonstrate the patrol's superintendent always followed recommendations for discipline. *Id.*

at 562. Therefore, but for Ford's recommendation, Darnell would not have been disciplined.

Here, there is no evidence Hughes would have been demoted and transferred but for the four complaints. Assuming those complaints were initiated and pursued for retaliatory purposes, it is apparent Ellis, Ripley and Wilhoit "set[ ] in motion a series of acts by others which [they] knew or reasonably should know would cause others to inflict constitutional injuries on third parties." *Id.* (citing *Johnson v. Duffy*, 588 F.2d at 743). Accordingly, as to Ellis, Ripley and Wilhoit, we find Hughes has made out a prima facie showing of retaliation in violation of his First Amendment rights. As to Stottlemyre, we conclude Hughes has failed in his prima facie showing and affirm the district court's grant of summary judgment.

B. Legitimate Non-retaliatory Reason/Evidence of Pretext

The district court found the Patrol had advanced a legitimate non-retaliatory reason for demoting and transferring Hughes because he admitted most of the underlying facts. It further concluded Hughes had presented no evidence suggesting the Patrol's reasons were a pretext for unlawful retaliation. On appeal, Hughes argues the district court's reasoning went beyond the arguments advanced by defendants in their summary judgment motion. Hughes contends the defendants only argued against his prima facie

showing of retaliation and never discussed any legitimate non-discriminatory reasons for their actions. Accordingly, he contends the district court should have limited its analysis to the issues raised in the summary judgment motion to which he was given an opportunity to respond. Defendants concede they did not raise the issue in their motion for summary judgment. They contend, however, the district court's holding was no surprise to Hughes because their brief argued Hughes was terminated on the basis of the complaints, not for his speech.

Hughes should not have been required to anticipate the district court would grant summary judgment on a basis defendants admit was not raised. Therefore, we conclude the district court erred in granting summary judgment. Accordingly, we reverse the district court's grant of summary judgment and remand for further proceedings.

III

The judgment of the district court granting summary judgment in favor of Colonel Stottlemyre in his official capacity is affirmed. The judgment of the district court granting summary judgment in favor of Ellis, Ripley and Wilhoit is reversed, and the case is remanded for further proceedings.

COLLOTON, Circuit Judge, concurring in part and dissenting in part.

The court holds that this case must be remanded for further proceedings with respect to three of the four defendants because the district court granted summary judgment "on a basis defendants admit was not raised." *Ante,* at 800. I respectfully disagree with this conclusion, and I would affirm the judgment of the district court as to all of the defendants.

The court's decision is premised on Hughes's contention that in the district court proceedings, "the defendants only argued against his prima facie showing of retaliation and never discussed any legitimate non-discriminatory reasons for their actions." *Ante*, at 800. This assertion by Hughes is incorrect. The defendants argued in support of their motion for summary judgment that "[t]here is no dispute that Mr. Hughes was under investigation for serious violations of Patrol policy," (J.A. at 162), and that "[t]he uncontroverted material facts establish that it was this misconduct, and not a random comment by Mr. Hughes a year earlier at a private planning meeting, that resulted in Mr. Hughes being disciplined." (*Id.* at 163-64). The brief continued that "[t]he evidence is clear and unequivocal that the Plaintiff was demoted and transferred by Stottlemyre because he engaged in serious misconduct, based on what Mr. Hughes admitted he did." (*Id.* at 164). That these arguments appeared under a heading asserting "[n]o causal connection" did not delimit the argument to a refutation of the plaintiff's prima facie case. "Causal connection" is a necessary element of *the claim,* not merely of a prima facie case, *see Revels v.*

Vincenz, 382 F.3d 870, 876 (8th Cir. 2004), and the defendants' brief in the district court never restricted its argument to defeating a prima facie case.

On behalf of defendant Ripley, the brief filed in the district court disputed Hughes's theory that he was targeted for discipline because he disagreed with Ripley. The brief argued that "Plaintiff's habit of misconduct and laziness were altered upon the arrival of a new corporal, Kevin Fisher," that "Fisher reported Plaintiff's misconduct," and that Ripley signed the complaints "because he was Plaintiff's supervisor, and he was told to sign by Professional Standards." (J.A. at 165-66). With respect to defendant Ellis, the brief likewise argued that he signed a complaint that "was generated by Corporal Fisher, who objected to Plaintiff entering his residence without authorization," and that Hughes's efforts to justify his actions were largely irrelevant, because "what is determinative is that Fisher initiated the complaints against Plaintiff." (*Id.* at 166-67 & n. 6). As for defendant Wilhoit, the brief urged that Hughes's speech was not "a motivating factor in Wilhoit's actions because Wilhoit was unaware of that activity." (*Id.* at 168).

Not surprisingly, Hughes responded to these arguments by attempting to generate a factual dispute concerning whether he was really demoted and transferred for misconduct and violations of patrol policy. He argued that "[i]n their efforts to pin the investigation of those incidents on Fisher, and thereby shield themselves from responsibility, defendants lied."

(*Id.* at 283). He asserted that "[t]he Patrol did not discipline others as harshly," and attempted to marshal evidence of similarly situated employees who were punished less severely for actions that Hughes asserted were comparable. (*Id.* at 284-85). Hughes's argument regarding Ripley, Ellis, and Wilhoit sought to question the credibility of their explanations. (*Id.* at 287-88).

The district court did not abuse its discretion in organizing these arguments under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See Graning v. Sherburne County*, 172 F.3d 611, 615 (8th Cir. 1999) (applying *McDonnell Douglas* to § 1983 First Amendment claim). The *McDonnell Douglas* method was "never intended to be rigid, mechanized, or ritualistic," *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978), and there is no requirement that parties use "magic words" to express their argument that the evidence generates no genuine issue of fact for trial. The substance of the arguments presented to the district court involved whether Hughes was demoted and transferred for a legitimate reason independent of his allegedly protected speech. With respect, the "admission" made by the appellees concerning their filings in the district court will not bear the weight assigned to it by the court. While the appellees "admit that they did not state their position *in the same language* as that used by the District Court," they assert it is "untrue and unfair to assert

that the District Court's analysis was a surprise to the Appellant." (Br. of Appellees at 22) (emphasis added). The brief of the appellees devotes five pages to demonstrating how the issue whether the defendants acted against Hughes for a legitimate reason was indeed fully aired before the district court.

The court's opinion, finding that Hughes has satisfied the "low threshold" of a prima facie case, *see Rodgers v. U.S. Bank*, 417 F.3d 845, 852 (8th Cir. 2005), should not preclude the defendants on remand from pursuing a renewed motion for summary judgment based on the contention that Hughes did not engage in protected activity, *see Garcetti v. Ceballos*, ___ U.S. ___, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006), or that Hughes was demoted and transferred for legitimate reasons. *See Hudson v. Norris*, 227 F.3d 1047, 1051 (8th Cir. 2000) (providing that although court would not consider arguments raised for the first time on appeal, "defendants may raise these issues on remand in a renewed motion for summary judgment, or at some other appropriate juncture, if they wish"). Because I find no procedural error by the district court, however, I would reach the merits and affirm the district court's conclusion that there is no genuine issue of fact for trial. Even assuming that Hughes engaged in protected speech, he admitted the misconduct underlying the disciplinary complaints that led to his demotion and termination. He failed to produce evidence of similarly-situated employees who were treated differently, and it is undisputed that complaints by Corporal Fisher were the catalyst for

the disciplinary complaints against Hughes. It is further undisputed that Lieutenant Wilhoit concluded two investigations, substantially completed a third, and received the assignment for a fourth before he was even aware of Hughes's alleged protected activity. For the reasons stated in the district court's thorough opinion, I would affirm the judgment dismissing the complaint. *See Hughes v. Stottlemyre,* No. 04-4053, 2005 WL 1279027 (W.D.Mo. May 27, 2005).

2005 WL 1279027

United States District Court, W.D. Missouri, Central Division.
David HUGHES, Plaintiff,
v.
Roger D. STOTTLEMYRE, James Ripley, Eric Wilhoit, and Vincent Ellis, Defendants.
No. 04-4053-CV-C-NKL.

May 27, 2005.

D. Eric Sowers, Ferne P. Wolf, Sowers & Wolf, LLC, St. Louis, MO, for Plaintiff.

Theodore A. Bruce, Missouri Attorney General's Office, Jefferson City, MO, for Defendants.

ORDER

LAUGHREY, J.

Pending before the Court is Defendants' Roger D. Stottlemyre ("Stottlemyre"), James Ripley ("Ripley"), Eric Wilhoit ("Wilhoit"), and Vincent Ellis ("Ellis") (collectively "Defendants") Motion for Summary Judgment [Doc. # 44]. For the reasons set forth below, the Court grants Defendants' Motion.

Also pending before the Court is Stottlemyre's individual Motion for Summary Judgment [Doc. 42]. Because the Court grants the Defendants' pending Motion, it will deny Stottlemyre's individual Motion as moot.

Also pending before the Court is Plaintiff David Hughes's ("Hughes") Motion to Strike [Doc. # 49]. Because the Court grants the Defendants' pending Motion without relying on those portions of the record that Hughes seeks to strike, the Court will deny Hughes's Motion as moot.

Also pending is Hughes's recent motion to amend his Complaint [Doc. 67]. Because that motion is untimely, it will be denied. Furthermore, it is futile because the record does not support a submissible claim based on the amendment.

I. Background

A. The Parties

Hughes was a sergeant in the Missouri Highway Patrol ("the Patrol") and he was the Zone Sergeant that supervised the Patrol's activities in Bates County, Missouri. Bates County is located within the jurisdiction of Troop A of the Patrol. Hughes was eventually demoted from his sergeant position and reassigned to the Gaming Division of the Patrol. Hughes still works for the Patrol as a trooper in the Gaming Division.

Ripley was a lieutenant in the Patrol and he directly supervised Hughes while Hughes was employed as a sergeant. Ellis was Commander of Troop A and he supervised both Ripley and Hughes. Stottlemyre was Superintendent of the Patrol and its highest ranking officer; Stottlemyre did not directly

supervise Hughes. Wilhoit was an investigator in the Professional Standards Division of the Patrol and he did not supervise Hughes.

B. The Protected Activity

Hughes was promoted to his Sergeant position in 1997. In his role as the Sergeant that oversaw Bates County, Hughes supervised numerous troopers, including Troopers Mark Pate ("Pate"), R.B. Arnold ("Arnold"), and B.D. Mullenix ("Mullenix"). Hughes also supervised Corporal Kevin Fisher ("Fisher").

In June 2003, Ripley notified Hughes about an upcoming meeting regarding consolidating Patrol zones in Bates County and Cass County. Cass County is also within the jurisdiction of Troop A. Before the meeting, Hughes gathered accident statistics for both Bates and Cass Counties, as well as accident statistics for another neighboring county.

Ellis, Ripley, and Hughes attended the meeting a few days later in June 2003. Ellis announced the plan to consolidate because of a manpower shortage in Cass County. Hughes objected to Ellis's consolidation plan because he believed the troopers would be trying to cover too much ground and that the consolidation would be a disservice to the citizens of Bates County. Hughes presented some accident statistics from Bates County that he collected in anticipation of the meeting and expressed his concern about the adverse consequences of the consolidation on Bates County. As an alternative to the consolidation plan, Hughes

suggested that Mullenix be re-assigned from Bates County to Cass County because Mullenix was the least productive trooper in Hughes's zone. Hughes also suggested that a trooper from a neighboring county also be re-assigned to Cass County. Ellis adopted Hughes's suggestion in part and decided to re-assign Arnold (a trooper from Hughes's zone) to Cass County for the summer of 2003 instead of going forward with the consolidation plan. At the conclusion of the meeting, Ripley was visibly angry at Hughes.

In September 2003, Ripley and Hughes again discussed the consolidation issue. Ripley told Hughes, "I thought we were together on this" and he was displeased that Hughes had suggested an alternative to the consolidation plan during the June 2003 meeting. Hughes expressed to Ripley that he believed the consolidation plan would spread troopers too thin between the two counties and that it would have a negative impact on the Patrol's activities in Bates County.

In October 2003, the Patrol implemented the consolidation plan.

C. The Adverse Employment Action

After he spoke out against the consolidation plan, Hughes alleges that Ripley and Ellis undertook a systematic plan to retaliate against him. Hughes also alleges that Wilhoit, in his capacity as an investigator for the Patrol, also engaged in the plan to retaliate against him for opposing the consolidation plan.

In his brief, Hughes alleges over thirty incidents that he believes constitute adverse employment actions. Below is an overview of the more substantial alleged adverse employment actions alleged by Hughes.

1. Employment Evaluations

a. Hughes's Evaluations

Hughes alleges that his employment evaluations reflect a retaliatory animus because they were more negative after his protected activity.

In October 2001, Ripley evaluated Hughes's performance and Ellis signed the evaluation. Ripley concluded that Hughes's performance fell between the ranges of "Meets Expectations" and "Excels" in all of the categories, which included Appearance, Communication Skills, Decision Making/Judgment, Management Techniques, Leadership, Interpersonal Skills, Dependability, and Supervision Skills. Hughes's October 2001 evaluation contained primarily positive comments regarding his conduct as a sergeant.

In October 2002, Ripley again evaluated Hughes and Ellis signed the evaluation. Again, Ripley concluded that Hughes's performance fell between "Meets Expectations" and "Excels" in all of the same categories as those in the October 2001 evaluation. The October 2002 evaluation was generally positive, although it contained more negative comments than Hughes's October 2001 evaluation, particularly

regarding Hughes's interpersonal skills. Ripley also noted, "Sergeant Hughes has become almost consumed with the notion that he is going to be transferred to another division of the patrol."

In October 2003, and after Hughes's protected activity, Ripley again evaluated Hughes and Ellis signed the evaluation. Ripley concluded that Hughes's performance fell between "Meets Expectations" and "Excels" in all of the same categories that were listed in Hughes's October 2001 evaluation. Although Hughes's evaluation was generally positive, there were more negative comments directed to specific incidents where Ripley felt that Hughes had performed inadequately as a sergeant. While discussing this evaluation, Ripley warned Hughes that he might face a demotion because of his conduct.

Hughes appealed the October 2003 evaluation to Ellis and challenged virtually every comment contained in it. Ellis rejected the appeal because he did not view the evaluation as a negative sanction of Hughes's conduct. Instead, Ellis recommended that "[i]t should serve as a guideline for you to improve in your job performance." Ellis also offered to meet with Hughes regarding the evaluation, but they never met to discuss it. Hughes alleges that his October 2003 evaluation was an adverse employment action that was retaliatory in nature.

b. Subordinates Evaluating Sergeants

In November 2003, Ripley instituted a new policy where corporals and troopers would evaluate their supervising sergeants. Hughes alleges that Ripley ignored and discounted the negative comments directed at Sergeant Davidson, who was also under Ripley's supervision. In his brief, Hughes outlines a series of negative comments that were directed at Davidson by his subordinates and alleges that Ripley took no action regarding these negative comments.

Hughes's evaluations by his subordinates also had a series of negative comments. Although Hughes's argument is unclear, it appears that he is arguing Ripley discounted negative comments against one sergeant, but then relied on the negative comments about Hughes to instigate disciplinary proceedings against him. Thus, it appears Hughes is arguing that Ripley has failed to treat similarly situated employees in the same fashion, thereby demonstrating Ripley's alleged retaliatory animus.

2. Three Disciplinary Complaints Signed By Ripley

In early 2004, Ripley signed three disciplinary complaints against Hughes that alleged that Hughes violated Patrol policies. Although the incidents occurred prior to early 2004, there is no evidence that Ripley had knowledge of Hughes's conduct prior to early 2004. Additionally, the undisputed evidence reflects that the complaints were initiated by Fisher,

a corporal that Hughes supervised, and that Defendants did not solicit or seek out the information contained in Fisher's complaints.

According to Patrol policy, when a subordinate officer submits a complaint about a superior officer, then the supervising officer who oversees the superior officer that is the subject of the complaint must sign the disciplinary complaint and submit it to the Professional Standards Division of the Patrol for an inquiry. Thus, when Fisher approached Ripley about his complaints against Hughes, Patrol policy dictated that Ripley had to sign the formal disciplinary complaints against Hughes in his capacity as Hughes's supervising officer – not as the individual who was the catalyst for the complaint.

Wilhoit investigated all of the complaints against Hughes in his role as an investigator with the Professional Standards Division of the Patrol. The evidence reflects that Wilhoit was assigned to investigate the complaints against Hughes by his supervisor.

a. Shooting Incident

On January 14, 2004, Ripley signed a complaint against Hughes with the Professional Standards Division of the Patrol for an incident that occurred in December 2003. On December 13, 2003, which was a Saturday, Mullenix fired his rifle across a Missouri highway to shoot a coyote and then trespassed on private property to recover the coyote. When Hughes learned about the incident the following Monday from

Mullenix, he did not immediately notify Ripley. Instead, Hughes instructed Fisher to tell Ripley about the incident during a meeting that Fisher had scheduled on Tuesday with Ripley. Hughes also instructed Fisher not to report all of the details to Ripley and to tell Ripley that employees of the Missouri Department of Transportation ("MODOT") had instigated the complaint against Mullenix, which was not true. Additionally, Hughes advised Mullenix not to discuss the incident with the Patrol without the representation of an attorney during the ensuing investigation.

Wilhoit conducted an investigation of Hughes's conduct. In a report dated March 2, 2004, Wilhoit substantiated the alleged misconduct by Hughes and found that Hughes's conduct violated Patrol policies. Wilhoit was assigned to investigate Hughes's misconduct by his supervising officer. As part of the investigation, Wilhoit questioned Hughes and Hughes admitted the basic facts underlying the misconduct charge, although he believed his conduct was justified.

b. Children

After the Patrol initiated its investigation of Hughes regarding the coyote shooting incident, Fisher felt compelled to report other misconduct by Hughes and this conduct formed the basis for the remaining three disciplinary complaints against Hughes.

On February 11, 2004, Ripley signed another complaint against Hughes. In his complaint, Ripley alleged that Hughes instructed one of the troopers that he supervised to pick up Hughes's children from school while the trooper was on duty and transport Hughes's children in a patrol car to Hughes's residence. Ripley alleged that this occurred three to four times between July 2001 and August 2003.

Wilhoit conducted the investigation into Hughes's conduct and Hughes admitted that he had ordered the trooper to pick up his children from school on at least two occasions. Hughes also admitted during the interview that he had used his Patrol vehicle to transport his children to and from school in the past. In a report dated February 13, 2004, Wilhoit found that the complaint was substantiated and that Hughes's conduct violated Patrol policies.

c. License Plates

On February 23, 2004, Ripley signed another complaint against Hughes for misconduct that occurred in July 2003. In his complaint, Ripley alleged that Senator Harold Caskey contacted Hughes and directed him to obtain a set of license plates from a private vehicle that was impounded in a private tow lot. The license plates belonged to one of Senator Caskey's constituents and the vehicle with the plates had been involved in a car accident in Butler, Missouri. Hughes directed a subordinate trooper to go to the tow lot and obtain the license plates; the trooper

complied and delivered the plates to Senator Caskey's law office. The owner of the tow lot protested the confiscation of the plates because he had not been paid for his towing services and he contacted Hughes directly.

Wilhoit conducted the investigation into Hughes's conduct. On March 16 and 18, Wilhoit interviewed several witnesses regarding the incident, including Hughes. Wilhoit also interviewed the owner of the tow lot and he stated that Hughes was very rude to him during their two conversations and advised him that he should know better than "to mess with Senator Caskey." The owner of the tow lot also stated that Hughes threatened to prevent this particular tow company from towing for the Patrol. According to the tow lot owner, Hughes hung up on him and the tow lot owner felt that Hughes used an intimidating tone.

Wilhoit also interviewed the trooper who obtained the plates and he verified that Hughes had instructed him to obtain them. During Wilhoit's interview with Hughes, Hughes admitted to the underlying conduct, but he disputed the tow lot owner's version of their conversations. In a report dated March 29, 2004, Wilhoit found that the complaint was substantiated.

3. Disciplinary Complaint Signed by Ellis

On March 22, 2004, Ellis signed a disciplinary complaint against Hughes for entering Fisher's home without Fisher's permission while no one was at

Fisher's home.[1] The complaint alleged that Hughes used Fisher's garage door pass code to enter Fisher's home and that Hughes searched Fisher's home for the spare key for Fisher's patrol car. After Hughes found the spare key, he drove Fisher's patrol car to the scene of an accident because his patrol car was damaged. Fisher approached his superiors after learning of Hughes's conduct and levied a complaint against Hughes and Ellis signed the formal complaint. Ellis signed the disciplinary complaint pursuant to the same Patrol policy that dictated Ripley sign the earlier three disciplinary complaints.

Wilhoit investigated the complaint that was signed by Ellis. As part of his investigation, Wilhoit interviewed Hughes and Hughes admitted the underlying conduct, although he claimed that he was justified in entering Fisher's home.

Wilhoit investigated the complaint against Hughes in his role as an investigator with the Professional Standards Division of the Patrol. In a report dated April 12, 2004, Wilhoit substantiated the facts underlying the disciplinary complaint. The evidence reflects that Wilhoit was assigned to investigate the complaint against Hughes by his supervisor.

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[1] Wilhoit's report indicates that Ripley initiated the complaint, but the actual complaint reflects that Ellis signed it. In their briefs, the parties do not dispute that Ellis was the party that actually signed the complaint against Hughes.

4. Wilhoit's Investigations

Hughes alleges that the commencement of the four disciplinary complaints against him was retaliatory. Moreover, Hughes alleges that Wilhoit's subsequent investigations into those complaints were also retaliatory. In his brief, Hughes implies that Wilhoit conspired with Ellis and Ripley to tarnish his reputation because Wilhoit knew Ripley from the Patrol academy.

5. Narcotics Officer Application

Hughes alleges that he applied for a position as a Narcotics Officer with the Patrol in March 2004. During Hughes's interview in April 2004, the interviewer asked Hughes whether there were any complaints pending against him and Hughes revealed the complaints and explained that the investigation was ongoing. Hughes did not receive the job and now alleges that his denial of the position was an adverse employment action that was the consequence of Defendants' allegedly retaliatory conduct.

6. Scheduling Issues

Hughes argues that Ripley imposed certain scheduling requirements on him that he did not impose on other sergeants. Specifically, Hughes alleges that Ripley thought Hughes was scheduling himself to be off work on too many Sundays and Wednesdays. As a result, Ripley began requiring that Hughes clear any of his personal schedule changes

with Ripley, which was not a requirement for other sergeants under Ripley's supervision.

7. Training Session

Hughes argues that Ripley improperly docked him 3.5 hours of compensatory time for a training session that occurred in August 2003. Ripley docked Hughes because Hughes did not wear his uniform to the training session. Hughes alleges that it was permissible not to be in uniform and that another Patrol employee was not in uniform during the training session.

8. Hughes's Demotion and Transfer

After Wilhoit substantiated the four disciplinary complaints against Hughes, Stottlemyre convened a meeting of his staff in May 2004 to decide what discipline to impose on Hughes. Wilhoit, Ellis, and Ripley all attended the meeting in their respective roles as investigators and Hughes's superiors. Stottlemyre did not solicit the opinions of Wilhoit and Ripley regarding what Hughes's punishment should be, but Ellis did offer an opinion that Hughes should be terminated from the Patrol. All of the attendees at the meeting except one advised that the Patrol should terminate Hughes's employment based on the admitted misconduct. Stottlemyre tentatively decided to terminate Hughes's employment.

After giving additional thought to the matter, Stottlemyre unilaterally decided the next day to demote and transfer Hughes instead of terminating him. Stottlemyre, in his capacity as the Patrol's highest-ranking officer, retains ultimate discretion over disciplinary decisions. Stottlemyre states in his affidavit that the three disciplinary complaints signed by Ripley were sufficient to warrant demoting and transferring Hughes.

In accordance with Stottlemyre's decision, the Patrol demoted Hughes to a trooper position and transferred him to the Gaming Division. It does not appear that Hughes is claiming that Stottlemyre violated his rights by demoting and transferring him because Hughes sues Stottlemyre in his official capacity and seeks only prospective injunctive relief. Pl.'s Sugg. in Opp. to Def.'s Mot. for Summ. J. at 44. He does not allege any personal misconduct on the part of Stottlemyre.[2]

D. Hughes's Complaint

Hughes filed his initial Complaint on March 25, 2004. Hughes filed his Amended Complaint on May 11, 2004, wherein he added Ellis as a defendant. Hughes's Amended Complaint contains one count in which he alleges that Defendants violated his

[2] Even in his proposed amendment to his Complaint, Hughes does not allege that Stottlemyre personally retaliated against him.

constitutional rights by retaliating against him for opposing the consolidation plan. Hughes names Ellis, Ripley, and Wilhoit in their official and individual capacities and alleges they committed the retaliatory misconduct. Hughes does not allege that Stottlemyre engaged in misconduct and he sues Stottlemyre only in his official capacity for injunctive relief. Hughes does suggest that his demotion and transfer by Stottlemyre were caused by the disciplinary actions which were initiated by the defendants who are sued in their individual capacity.

II. Discussion

To succeed on his First Amendment retaliation claim, Hughes must show (1) that he engaged in protected activity; (2) the government official took adverse action against him; and (3) the protected activity was a substantial or motivating factor that led to the adverse employment action. *Revels v. Vincenz,* 382 F.3d 870, 876 (8th Cir. 2004); *Ingram v. Johnson,* 187 F.3d 877 (8th Cir. 1999). After a public employee satisfies the initial burden of making out a *prima facie* case, the burden shifts to the public employer to show a legitimate, non-retaliatory reason for the adverse employment action. *Duffy v. McPhillips,* 276 F.3d 988, 991 (8th Cir. 2002) (citing *Graning v. Sherburne County,* 172 F.3d 611, 615 (8th Cir. 1999)) (applying the burden-shifting test in the First Amendment retaliation context). If the employer meets this burden, then the burden shifts back to the

employee to show that the employer's offered reason is pretextual. *Id.*[3]

A. Protected Activity

Defendants argue that Hughes's statements concerning the consolidation plan did not constitute protected activity because Hughes was speaking on a personal matter that did not implicate a public concern.

Defendants are correct that not all speech by a public employee constitutes protected activity. *Belk v. City of Eldon,* 228 F.3d 872, 879 (8th Cir. 2000). Courts hold that, "[w]hen a public employee's speech is purely job-related, that speech will not be deemed a matter of public concern. . . . Unless the employee is speaking as a concerned citizen, and not just as an employee, the speech does not fall under the protection of the First Amendment." *Id.* (citing *Buazard v. Meridith,* 172 F.3d 546, 548 (8th Cir. 1999)).

To constitute protected activity, the speech at issue must relate to "a matter of public concern." *Sparr v. Ward,* 306 F.3d 589, 594 (8th Cir. 2002)

[3] The Court of Appeals for the Eighth Circuit has held that this burden-shifting framework is still applicable at the summary judgment stage and that the framework was unaffected by the Supreme Court's decision in *Desert Palace, Inc. v. Costa,* 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003). *See Torlowei v. Target,* 401 F.3d 933, 934 (8th Cir. 2005) (citing *Griffith v. City of Des Moines,* 387 F.3d 733, 735-36 (8th Cir. 2004)).

(citing *Connick v. Myers,* 461 U.S. 138, 146, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983)). To qualify as a matter of public concern, the issue must be "a matter of political, social, or other concern to the community" and courts look to the content, form and context of the speech, as revealed by the whole record, to determine whether it is a matter of public concern. *Id.* Complaints to superiors or private communications with an employer about matters of public concern are protected activity. *Campbell v. Arkansas Dep't of Correction,* 155 F.3d 950, 959 (8th Cir. 1998). Whether speech constitutes a public concern is a matter of law for a court to decide. *Sparr,* 306 F.3d at 594.

The undisputed evidence reflects that when Hughes objected to the consolidation plan during the June 2003 meeting, he raised a number of issues that he viewed as potential problems, including whether there would be enough Patrol coverage for Bates County. Hughes expressed his belief that the consolidation plan would be a disservice to Bates County and harm Patrol coverage in that area. Although Hughes's objection may have been motivated, in part, by personal concerns, it is also clear that he was motivated by a concern that the plan would be a disservice to Bates County and its citizens. Thus, the content of Hughes's speech weighs in favor of finding that he was speaking on a matter of public concern.

Similarly, the context and form of Hughes's speech demonstrates that it touched on a matter of public concern. Hughes's comments were during a meeting with his supervisors and co-worker to discuss

the consolidation plan and they were in the form of a presentation by Hughes in which he relied on data that he compiled regarding accident statistics in Bates County. Hughes's speech was not a private conversation or off-the-cuff comments; instead, it was a prepared presentation that was communicated directly to the supervisors that are accused of the retaliation. Because Hughes's conduct implicated public policy concerns for citizens of Bates County and it was delivered during a meeting with his supervisors, the Court finds that Hughes's speech was protected activity.

B. Adverse Action

To constitute an adverse employment action, the wrongful conduct must "have an adverse impact on the employee and must effectuate 'a material change in the terms or conditions of . . . employment.' Stated another way, 'proof of an adverse employment action requires a tangible change in duties or working conditions that constitute a material disadvantage.'" *Jones v. Fitzgerald,* 285 F.3d 705, 713 (8th Cir. 2002) (internal citations omitted). Examples of material disadvantages that may constitute an adverse employment action include a detrimental change in salary, benefits, or responsibilities. *Tademe v. Saint Cloud State Univ.,* 328 F.3d 982, 992 (8th Cir. 2003). Actions short of termination may constitute an adverse employment action, but "'not everything that makes an employee unhappy is an actionable adverse action.'" *Id.* (citations omitted).

In his brief, Hughes offers over thirty incidents that he claims demonstrate adverse action by his superiors. Many of the incidents in Hughes's brief do not contain a citation to the record or they are so patently unsupported in the law that they do not warrant a detailed discussion about whether they rise to the level of adverse action. Thus, the Court will focus on those incidents that did affect, or may have affected, the actual terms and conditions of Hughes's employment.

1. Evaluations

a. Hughes's Evaluations

Hughes alleges that his October 2003 evaluation was an adverse employment action. However, a comparison of that evaluation with Hughes's evaluations before he engaged in protected activity demonstrates that they are substantially similar in that Ripley evaluated Hughes's performance as being between "Meets Expectations" and "Excels" in all the categories in all of the evaluations. Although Hughes's October 2003 evaluation may contain some more pointed critiques of his performance, there is no evidence that these comments are significantly inconsistent with the evaluations conducted before the consolidation meeting; particularly, the evaluation in October 2002, which also had some negative comments regarding Hughes's performance.

Nonetheless, even assuming that the evaluations, which were done after the consolidation meeting,

were substantially more negative than Hughes's previous evaluations, there is no evidence that they had any impact on his demotion, his failure to get the narcotics position, or the loss of 3.5 hours of compensatory time. The Eighth Circuit holds that a poor performance rating or an unfavorable evaluation are "actionable only where the employer subsequently uses the evaluation as a basis to detrimentally alter the terms or conditions of the recipient's employment." *Spears v. Missouri Dep't of Corrections and Human Resources,* 210 F.3d 850, 854 (8th Cir. 2000) (citations omitted). *See also Jones,* 285 F.3d at 714 (presence of a negative memoranda in a personnel file, without more, does not constitute adverse action). *See also LaCroix v. Sears, Roebuck, & Co.,* 240 F.3d 688, 692 (8th Cir. 2001) ("[A] negative review is actionable only where the employer subsequently uses the evaluation as a basis to detrimentally alter the terms or conditions of the recipient's employment."). It is not enough if an unfavorable evaluation merely "demeans" a plaintiff in the eyes of the plaintiff's co-workers. *Spears,* 210 F.3d at 854.

Stottlemyre did not rely on Hughes's October 2003 evaluation in reaching his decision to demote and transfer Hughes. Equally important, there is no evidence that Ripley and Ellis relied on the evaluation in reaching their decision to submit the administrative complaints against Hughes. Nor is there evidence that Hughes did not get the narcotics position because of the evaluation. Because the October 2003 evaluation did not as a matter of law have any

impact on subsequent adverse actions, it does not constitute an independent, adverse employment action.

b. Troopers' Evaluations of Sergeants

Hughes also alleges that Ripley's policy of having subordinate Patrol employees evaluate their sergeants was somehow retaliatory in nature against Hughes. This policy does not constitute an adverse employment action because it did not materially change Hughes's working conditions. *Tademe v. Saint Cloud State Univ.,* 328 F.3d 982, 992 (8th Cir. 2003). Furthermore, even if it were an adverse employment action, the evidence reflects that Ripley instituted this policy with respect to all of the sergeants under his command – not just Hughes. Employment policies that are equally and neutrally applied to all employees cannot give rise to an inference of wrongful animus. *Smith v. Monsanto Chemical Co.,* 770 F.2d 719 (8th Cir. 1985) (uniform application of termination policy could not be basis for an adverse employment action); *Shaner v. Synthes,* 204 F.3d 494 (3rd Cir. 2000) (gender-neutral application of employment policy did not give rise to discriminatory inference in Title VII context) (citations omitted). Therefore, because Ripley applied the new evaluation policy to all of the sergeants under his supervision, a reasonable jury cannot find that the new policy was instituted in retaliation for Hughes's speech.

2. Disciplinary Complaints

Hughes argues that the four disciplinary complaints signed by Ripley and Ellis also constitute adverse employment action that injured his constitutional rights. Although the complaints themselves did not constitute a change in the material terms of Hughes's employment, they did culminate in Hughes's demotion and transfer. Thus, according to Hughes's theory, Ripley's and Ellis's complaints were the catalyst for the demotion and transfer that was later implemented by Stottlemyre.

In the context of First Amendment retaliation cases, filing a disciplinary complaint against an employee can constitute adverse employment action that is actionable if the disciplinary complaint sets in motion a "series of acts by others which the actor knows or reasonably should know would cause others to inflict constitutional injuries. . . ." *Graves v. Arkansas Dep't of Finance & Admin.*, 229 F.3d 721, 723 (8th Cir. 2000); *Darnell v. Ford*, 903 F.2d 556, 562 (8th Cir. 1990). Hughes alleges that Ripley's and Ellis's complaints set in motion Stottlemyre's conduct and, in this respect, they culminated in an actionable adverse employment action. Therefore, the disciplinary complaints signed by Ripley and Ellis that led to Hughes's ultimate demotion and transfer can constitute an adverse employment action, viewing the evidence in the light most favorable to Hughes.

3. Wilhoit's Investigation

Similarly, Hughes alleged that Wilhoit's investigation of Hughes's conduct constitutes adverse employment action because it culminated in Stottlemyre's adverse action against Hughes. Because Wilhoit's conduct is not inherently an adverse action, it can only be an adverse employment action if it culminated in Stottlemyre's decision to demote and transfer Hughes. Because Wilhoit's investigation was a necessary link between the complaints and Hughes's demotion, the Court will assume that it is an adverse action.

4. Scheduling Issues

The scheduling requirements that Ripley imposed on Hughes do not constitute an adverse employment action because there is no evidence to show that this change materially affected a term of Hughes's employment. To constitute an adverse employment action, the action must be more than "minor changes in duties or working conditions." *Henthorn v. Capitol Communications, Inc.*, 359 F.3d 1021, 1028 (8th Cir. 2004). Moreover, a change in an employee's working conditions that merely makes the employee unhappy or disappointed cannot constitute an adverse action. *Saulsberry v. St. Mary's Univ. of Minnesota*, 318 F.3d 862, 868 (8th Cir. 2003).

Although Hughes may have been disappointed by Ripley's oversight of his schedule, that is not sufficient because the supervision was merely a "minor"

shift in his working conditions. *Henthorn,* 359 F.3d at 1028. Ripley's supervision of Hughes's schedule did not alter any tangible benefit of Hughes's job nor did it substantially alter his schedule.

5. Training Session

Hughes's allegation that he was improperly docked 3.5 hours of compensatory time does qualify as an adverse employment action. If an employment policy results in a "detrimental change in salary, benefits, or responsibilities" then it can constitute an adverse employment action. *Tademe,* 328 F.3d at 992. Compensatory time is a tangible benefit. Therefore, denial of that compensatory time is a "material change in terms or conditions of employment" and qualifies as an adverse employment action. *Jones,* 285 F.3d at 713.

6. Narcotics Division Application

Failing to promote an employee is an adverse employment action. *Dorsey v. Pinnacle Automation Co.,* 278 F.3d 830 (8th Cir. 2002).

C. Causation

Based on the foregoing, the following activities are adverse employment actions: (1) four disciplinary complaints signed by Ripley and Ellis, which allegedly resulted in Stottlemyre's decision to demote and transfer Hughes; (2) Wilhoit's investigation and

substantiation of the four disciplinary complaints; (3) loss of 3.5 hours in compensatory time for not wearing his uniform; and (4) the denial of Hughes's transfer to the narcotics division. The next question is whether Hughes has presented sufficient evidence to make a *prima facie* case of causation; i.e., that these adverse actions were motivated by a retaliatory animus.

1. Training Session

Hughes claims that he lost 3.5 hours in compensatory time because of the statements he made concerning the consolidation of the Highway Patrol staff in Bates and Cass Counties. Hughes offers only his deposition to support his claims regarding the training session and the penalty for not wearing his uniform. In his deposition, Hughes states that another Patrol employee was not in uniform and that "[t]o my knowledge, his pay wasn't docked." (Hughes Tr. 108:4.) Under further questioning, Hughes admitted that he did not know for sure whether the other employee's pay was docked and he admitted that he did not inquire about the other employee's compensatory time. Moreover, Hughes alleged that it was permissible to not be in uniform during training sessions, but he did not offer any evidence or policy to support his claim. Instead, Hughes relied on the conclusory statements in his deposition.

Hughes cannot specifically point to any other employee who did not wear a uniform to the training

and was not docked the compensatory time. Moreover, Hughes does not offer any Patrol policy or directive that states it is permissible not to be in uniform during a training session. Hughes's entire allegation surrounding the training session relies solely on his own conclusory statements unsupported by admissible evidence. Conclusory statements by a plaintiff are not sufficient to make a submissible case. *Sowell v. Alumina Ceramics, Inc.*, 251 F.3d 678, 683-84 (8th Cir. 2001); *Jeseritz v. Potter*, 282 F.3d 542, 547 (8th Cir. 2002); *Miller v. Citizens Sec. Group, Inc.*, 116 F.3d 343, 346 (8th Cir. 1997). Thus, the Court finds that a reasonable fact finder could not infer a causal nexus between Hughes's protected activity and the training session incident.

2. Denial of Transfer to Narcotics Division

Hughes has not presented any evidence that any of Defendants were involved in the Patrol's decision not to accept his application for a position in the narcotics division. Moreover, Hughes has not presented any evidence that the individuals who rejected his application for the narcotics position knew about his protected activity. Where different decision-makers were involved in an adverse action, there is no basis for finding liability, particularly if the decision-maker had no knowledge about underlying protected activity. *Eley v. United States Dep't of Veterans Affairs*, No. 03-2782, 2004 WL 768671 (8th Cir. Apr. 9, 2004); *TRI, Inc. v. Boise Cascade Office Products, Inc.*, 315 F.3d 915, 919 (8th Cir. 2003); *cert*

denied, 539 U.S. 960, 123 S.Ct. 2655, 156 L.Ed.2d 659 (2003). It appears that Hughes is arguing that the disciplinary complaints filed by Ripley and Ellis caused him not to get the promotion, but Hughes does not present any evidence to support his argument beyond his own speculation. Hughes's argument is based on conjecture and not on evidence contained in the record. Therefore, a reasonable juror could not conclude that Hughes failed to get the narcotics position because of his statements concerning the consolidation plan.

3. Disciplinary Complaints and Investigations

For purposes of this Motion, the Court will assume without deciding, that Hughes has made a *prima facie* case that the disciplinary complaints and investigations were causally linked to his statements concerning the consolidation plan. This assumption is based only on the evidence which supports Hughes's claim. The Court next turns to the remaining steps in the *McDonnell Douglas* framework.

D. Legitimate, Non-Retaliatory Reasons

The next question is whether the Defendants have provided evidence of a legitimate, non-retaliatory reason for the disciplinary complaints against Hughes and the ensuing investigations.

The Eighth Circuit holds that employers may demonstrate legitimate, non-retaliatory reasons for

adverse employment actions in a variety of ways. If an employer's adverse employment action derives from a violation of an employer's policy, then the employer can satisfy the legitimate, non-retaliatory prong of the burden-shifting framework. *See Grey v. City of Oak Grove, Missouri,* 396 F.3d 1031, 1035 (8th Cir. 2005) (violation of city personnel policies was a legitimate, non-retaliatory reason); *Dhyne v. Meiners Thriftway, Inc.,* 184 F.3d 983, 989 (8th Cir. 1999) (violation of company lunch policy was a legitimate, non-retaliatory reason). Not surprisingly, where an employee admits the factual circumstance underlying the adverse employment action, then the employer has a legitimate, non-retaliatory reason for taking the adverse action. *Stuart v. General Motors Corp.,* 217 F.3d 621, 634 (8th Cir. 2000).

The Defendants have submitted evidence of a legitimate, non-retaliatory reason for the disciplinary complaints against Hughes. Fisher presented his concerns about Hughes to Ripley and Ellis and they, in turn, timely signed the complaints in accordance with Patrol policy that required their signature and forwarded them to the Professional Standards Division. In the complaints, Defendants alleged that Hughes violated Patrol policy on a number of occasions, which can be the basis for a legitimate, non-retaliatory reason for their conduct. *See Grey,* 396 F.3d at 1035.

Similarly, Wilhoit has submitted evidence that he had a legitimate, non-retaliatory reason for investigating the disciplinary complaints and ultimately

substantiating them. Wilhoit investigated the complaints as part of his job duties with the Professional Standards Division and he did not seek out an assignment to Hughes's case; instead, he was involuntarily assigned by his supervisor to Hughes's case. When Wilhoit interviewed Hughes about the complaints, Hughes admitted the underlying conduct. As previously stated, when an employee admits the underlying conduct, there is evidence of a legitimate, non-retaliatory reason for the discipline. *Stuart,* 217 F.3d at 634.

E. Pretext

Because Defendants have provided evidence of legitimate, non-retaliatory reasons for their conduct, the burden of production shifts back to Hughes to demonstrate that these reasons were pretext for Defendants' true retaliatory animus. For a plaintiff to establish the plaintiff's *prima facie* case, the plaintiff must offer only minimal evidence. *Cherry v. Ritenour Sch. Dist.,* 361 F.3d 474, 479 (8th Cir. 2004); *Sprenger v. Fed. Home Loan Bank of Des Moines,* 253 F.3d 1106, 1111 (8th Cir. 2001). However, in the pretext stage of a court's analysis, a plaintiff must provide substantial evidence of pretext in order to defeat a dispositive motion. *Cherry,* 361 F.3d at 479 (emphasis added); *Sprenger,* 253 F.3d at 1111 (emphasis added). Courts impose this higher standard at the pretext stage because the evidence is now viewed in light of the employer's justification for the adverse employment action. *Sprenger,* 253 F.3d at 1111.

1. Disciplinary Complaints by Ripley and Ellis

a. Similarly Situated Employees

Hughes claims that employees similarly situated to him were treated differently and this is sufficient to establish pretext. *See Graves v. Arkansas Dep't of Finance & Admin.*, 229 F.3d 721, 723 (8th Cir. 2000); *Darnell v. Ford,* 903 F.2d 556, 562 (8th Cir. 1990). To be similarly situated to the plaintiff, the employee in question "must have dealt with the same supervisor, have been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances." *Tolen v. Ashcroft,* 377 F.3d 879, 882 (8th Cir. 2004) (citations omitted).

In *Graves* and *Darnell,* the court held that the circumstances of the disciplinary complaints may give rise to an inference of pretext because both cases contained evidence that the officer who complained about the plaintiff's conduct had ignored similar conduct by other officers and singled out the plaintiff for disciplinary treatment. Hughes, however, does not offer any similarly situated employees who were treated differently than he was. Although Hughes attempts to submit information regarding similarly situated employees, closer scrutiny reveals that these employees are not comparable to Hughes. Hughes first argues that Ripley ignored the negative comments on the evaluations that Davidson's subordinates wrote and, because Ripley ignored the comments, then he must have retaliatory animus against Hughes. Hughes's argument is misplaced.

First, the undisputed catalyst for Ripley initiating the three disciplinary complaints against Hughes was Fisher's complaints about Hughes – not the negative comments contained in Hughes's subordinate evaluations. Second, there is no evidence that any subordinate ever presented specific, particular complaints about Davidson's misconduct with the Patrol. The comments on Davidson's evaluations are negative, but they do not allege specific instances of misconduct that are in clear violation of Patrol policies; instead, they are generalized comments about Davidson's management and leadership style. Thus, because there is no evidence that one of Davidson's subordinates submitted specific complaints about Davidson above and beyond the generalized comments in his evaluations, Hughes and Davidson are not similarly situated employees.

Hughes also offers the discipline records of several employees within the Patrol who allegedly engaged in the same conduct as Hughes and were not demoted and transferred. Again, Hughes's argument misses the mark. Several of the employees are different ranks than Hughes; thus, they are facially not similarly situated. Also, none of the employees were under the supervision of Ripley or Ellis. The only nexus between Hughes and these employees is that Stottlemyre imposed the discipline in all the cases, but Hughes does not allege any misconduct on the part of Stottlemyre. Hughes's submission of disciplinary records of employees who were not supervised

by Ripley or Ellis cannot give rise to an inference of pretext against those Defendants.

Hughes has not presented any evidence that Ripley or Ellis knew about comparable conduct by other employees under their supervision and ignored it. Hughes's failure to submit such evidence of similarly situated employees defeats his claim of pretext and a reasonable fact finder could not find in favor of Hughes on this issue.

In addition to submitting evidence regarding similarly situated employees, the plaintiffs in *Graves* and *Darnell* involved situations where the complaining officer was instigating the complaint and the complaining officer had knowledge of the plaintiff's misconduct prior to the protected activity and chose not to report it until after the plaintiff engaged in the protected activity. Hughes fails to submit any evidence that Ripley or Ellis knew about his misconduct prior to his protected activity and did not report it. Fisher began reporting Hughes's misconduct in early 2004 and the disciplinary complaints were submitted shortly thereafter.

Hughes also fails to submit any evidence to rebut Defendants' assertion that Fisher was the officer who instigated the misconduct complaints against Hughes. Although Ripley and Ellis signed the complaints, they signed the complaints in accordance with the Patrol's policies and in response to Fisher's complaints.

Because Hughes has failed to offer evidence of similarly situated employees, reasonable fact finder could not infer that Defendants' conduct was pretext for their retaliatory animus against Hughes.

b. Temporal Proximity

The temporal proximity of the disciplinary complaints also refutes Hughes's assertion of pretext. Although temporal proximity is not dispositive of whether there is an inference of pretext, it is a factor that courts consider. In this case, the alleged retaliatory activity did not occur until six months after Hughes engaged in his protected activity. The meeting about the consolidation plan occurred in June 2003 and the first disciplinary complaint was not signed by Ripley until January 14, 2004. Courts hold that a time interval between the protected activity and the adverse action greater than a few months cannot give rise to an inference of retaliation. *See Eley v. U.S. Dep't of Veterans Affairs,* No. 03-2782, 2004 WL 768671 (8th Cir. Apr. 9, 2004) (interval of four months between protected activity and adverse action); *Trammel v. Simmons First Bank of Searcy,* 345 F.3d 611, 616 (8th Cir. 2003) (interval of two months between protected activity and adverse action); *Kipp v. Missouri Highway & Transp. Comm'n,* 280 F.3d 893, 896-97 (8th Cir. 2002) (interval of two months between protected activity and adverse action). Therefore, a reasonable fact finder could not infer pretext because of the six-month interval

between the first disciplinary complaint and his protected activity.

c. October 2003 Evaluation

Similarly, Hughes cannot rely on his October 2003 evaluation as evidence of pretext because his October 2003 evaluation was not materially different from his previous evaluations. These minor differences cannot give rise to an inference that Ripley intended to retaliate against Hughes for his opposition to the consolidation plan. Hughes's overall scores in October 2003 were very consistent with his previous evaluations, although the comments section did contain more pointed critiques. Such comments, particularly where they did not form the basis for a subsequent adverse employment action and they occurred four months after the protected activity, cannot give rise to an inference of retaliation.

2. Wilhoit's Investigation

Hughes cannot provide substantial evidence that would cause a reasonable fact finder to infer that Wilhoit's legitimate, non-retaliatory reasons for his actions are pretextual. There is no evidence that Wilhoit had any knowledge of Hughes's protected activity until Hughes filed his Complaint on March 25, 2004.[4] Hughes attempts to establish that Wilhoit

[4] Wilhoit argues he did not have knowledge of the alleged protected activity until he responded to Hughes's interrogatories

(Continued on following page)

had knowledge of the protected activity prior to March 25 but he does not offer any evidence in the record; instead, he implies that Wilhoit conspired with Ripley and Ellis because Wilhoit attended the Patrol academy with Ripley. Because of their past relationship, according to Hughes's theory, Ripley must have told Wilhoit about his protected activity and conspired with Wilhoit to act against Hughes. This argument is based on Hughes's conjecture and there is no evidence in the record to support it. Therefore, the Court will treat March 25, 2004, as the date that Wilhoit received knowledge about Hughes's protected activity.

Before March 25, 2004, Wilhoit had already substantiated the first two disciplinary complaints against Hughes – the highway shooting by Mullenix and the order by Hughes to a subordinate to transport Hughes's children. The former was substantiated in a report dated March 2, 2004, and the latter was substantiated in a report dated February 13, 2004. Thus, Wilhoit's conduct in relation to these two complaints cannot give rise to an inference of pretext.

The third disciplinary complaint regarding the license plates from the tow lot was not substantiated until March 29, 2004 – four days after Hughes filed

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during the course of discovery. However, viewing the evidence in the light most favorable to Hughes, the Court finds that Hughes's Complaint on March 25, 2004, put Wilhoit on notice of Hughes's alleged protected activity.

his Complaint and Wilhoit gained knowledge of Hughes's protected activity. However, the record reveals that Wilhoit had already interviewed several witnesses prior to March 25, 2004, and that the investigation was already well under way when Hughes filed his Complaint. Thus, Wilhoit's commencement of the investigation cannot give rise to an inference of pretext because he did not have knowledge of the protected activity at the time this investigation was commenced.

The fourth complaint regarding Hughes entering Fisher's home was filed on March 22, 2004 – three days before Hughes filed his Complaint. Although Wilhoit did not interview the witnesses or file his report substantiating the complaint until after Hughes filed his Complaint on March 25, the evidence reflects that Wilhoit had already been assigned to investigate the matter by that time. In retrospect, it may have been imprudent for Wilhoit's supervisors to keep him assigned to Hughes's case after Hughes filed his Complaint, but that fact does not create a basis for imputing retaliatory motive to Wilhoit as an individual.

For the foregoing reasons, the timing of Wilhoit's investigations cannot support an inference of retaliatory pretext by Wilhoit. When Hughes filed his Complaint on March 25, the evidence reflects that Wilhoit had concluded the first two investigations, was substantially finished with the third investigation, and had already been assigned to the final investigation.

Wilhoit's findings regarding the disciplinary complaints might be more suspect if Hughes had not admitted the underlying conduct that was the basis for all four of the complaints. However, because Hughes admitted the conduct, Wilhoit was not forced to make a credibility determination about Hughes nor did he have to weigh competing factual scenarios. Instead, Wilhoit had to determine if the underlying conduct violated Patrol policies. Wilhoit believed it did and Stottlemyre's subsequent disciplinary action against Hughes reinforces that Wilhoit's position was consistent with the Patrol's views. No reasonable juror could conclude on this record that Hughes's conduct was not a violation of Patrol policies.

The Court acknowledges that Hughes believes his conduct regarding each disciplinary complaint was somehow justified, but that is not an issue for this Court to decide because courts do not sit as "super-personnel departments to resolve such disagreements." *Henderson v. Ford Motor Co.*, 403 F.3d 1026, 2005 WL 850893 at *4 (8th Cir. Apr. 14, 2005) (federal courts do not have "authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination.") (quoting *Kincaid v. City of Omaha*, 378 F.3d 799, 805 (8th Cir. 2004)). Moreover, it is not unlawful for employers to make employment decisions based on erroneous evaluations or information, as long as the decisions are not motivated by retaliatory animus. *Evers v. Alliant Techsystems,*

Inc., 241 F.3d 948, 957 (8th Cir. 2001). Thus, instead of focusing on whether Hughes's conduct was justified and the Patrol's decisions were erroneous, the inquiry before this Court is whether there is sufficient evidence to demonstrate a retaliatory pretext. Hughes has failed to aver such evidence and a reasonable trier of fact could not infer one.

III. Conclusion

Accordingly, it is hereby

(1) ORDERED that Defendants' Motion for Summary Judgment [Doc. # 44] is GRANTED;

(2) ORDERED that Roger D. Stottlemyre's individual Motion for Summary Judgment [Doc. # 42] is DENIED as moot; and

(3) ORDERED that Plaintiff's Motion to Strike [Doc. # 49] is DENIED as moot; and

(4) ORDERED that Plaintiff's Motion to Amend [Doc. # 67] is DENIED.